3-29-68. Plaintiff's reply brief to defendant's statement of reasons filed. Mailed 3-29-68.

4-8-68. Motion by defendant for leave to file response to plaintiffs' reply brief filed. Mailed 4-8-68.

4-10-68. Order granting defendant leave to file response to plaintiffs' reply brief instanter filed. DJY. Copies 77(d) mailed to Murray and Maguire.

4-10-68. Response of defendant to plaintiffs' reply brief filed. Mailed 4-8-68.

4-17-68. Motion by plaintiffs for leave to file response to defendant's reply brief filed. Mailed 4-16-68.

4-18-68. Motion by defendant for leave to file answer to plaintiffs' reply brief filed. Mailed 4-18-68.

4-25-68. Plaintiff's motion for leave to file response to defendants reply brief filed. Mailed 4-24-68.

7-25-68. Memorandum re defendant's motion to dismiss filed. DJY. Copies mailed to: Murray and Maguire.

7-25-68. Order sustaining parties motions for leave to file additional briefs filed. DJY. Copies 77(d) mailed to: Murray and Maguire.

7-25-68. Order overruling defendant's motion to dismiss, overruling defendant's motion for summary judgment, overruling plaintiffs' motion for summary judgment filed. DJY. Copies 77(d) mailed to Murray and Maguire.

7-25-68. Reply Brief of plaintiff filed. Mailed 4-16-68.

7-25-68. Answer to plaintiffs' reply brief filed. Mailed 4-18-68.

7-25-68. Answer to defendants reply brief filed. Mailed 4-24-68.

9-4-68. Answer filed. Mailed 9-4-68.

9-4-68. Third party complaint filed.

9-4-68. Third-party summons issued. Copy of summons and copy of complaint to U.S. Marshal.

9-18-68. Letter re agreement between parties as to an extension of time for defendant (third party) to 10-15-68 to move or plead filed.

10-25-68. Stipulation and order extending time to 11-13-68 for third party defendant to file a responsive pleading filed. DJY. Copies 77(d) mailed to Murray, Maguire and Hart.

11-13-68. Answer of third party defendant filed. Mailed 11-12-68.

12-3-68. Third-party summons returned, served 10-31-68 and filed. $3.00

4-16-69. Notice to attend pre-trial conference on 5-12-69 mailed.

5-1-69. Trial brief of third-party defendant filed.

5-1-69. Trial brief of defendant filed.

5-8-69. Trial brief of plaintiff filed.

5-12-69. Pre-trial order filed. DJY. Cause is set for trial on 9-15-69. Copies 77(d) mailed to Murray, Maguire and Hart.

8-5-69. Deposition of Frank A. Johnson on behalf of plaintiffs, filed.

8-7-69. Plaintiff's motion for summary judgment, with attached memorandum in support of, filed. Copy mailed.

8-7-69. Deposition of Fred S. Yancey on behalf of plaintiffs, filed.

8-19-69. Plaintiff's interrogatories, filed. Copies mailed 8-15-69.

8-19-69. Defendant's answers to plaintiff's interrogatories, filed. Copy mailed.

8-21-69. Stipulation and Order between parties, agreeing as to authenticity of copies of agreements marked Joint Exhibits 1-10, inclusive, filed. DJY. Notice waived.

8-21-69. Stipulation and Order granting defendant until September 2, 1969 in which to file its statement of reasons in opposition to plaintiff's motion for summary judgment, filed. DJY. Notice waived.

8-27-69. Deposition of W. A. Noell on behalf of defendant, filed.

9-2-69. Defendants memorandum in opposition to plaintiffs motion for Summary judgment, filed. Copy mailed.

9-2-69. Defendants motion for summary judgment with statement of facts in support of, filed. Copy mailed.

9-3-69. Defendants exhibit list, with accompanying exhibits, filed. Copy mailed (exception of "B" as too bulky) 9-3-69.

9-11-69. Plaintiff's reply memorandum to defendants brief in opposition to plaintiff's motion for summary judgment, filed. Copy mailed 9-10.

9-15-69. Deposition of Joseph E. Fitz a plaintiff for defendant Norfolk & Western RR., filed.

9-15-69. Plaintiff's exhibit list, filed. Copy mailed 9-11-69.

9-17-69. Plaintiffs Memorandum in opposition to defendants motion for summary judgment, filed.

9-17-69. Defendant's Reply to plaintiffs' memorandum in opposition to defendants motion for summary judgment, filed, Copy mailed 9-17-69.

9-19-69. Plaintiffs reply memorandum to defendants memorandum, filed.

10-14-69. Photocopy of Brief of the Interstate Commerce Commission, Amicus Curiae filed.

10-21-69. Plaintiff's brief in reply to N & W, filed.

12-19-69. Opinion of the Court, filed. Copies 77(d) to Murray, Maguire & Hart. DJY,J.

12-31-69. Plaintiffs Order (Rule 4(a)), Lodged.

1-6-70. Defendants statement of objections as to plt's. proposed form of judgment, filed. Copy mailed.

1-6-70. Defendants Final Judgment as to Plaintiffs and defendant, Lodged.

1-8-70. Ordered that a declaratory judgment be rendered in favor of plaintiffs against defendant, requiring that parties submit to arbitration the question of the amount of damages, as required by protective order of ICC, and Ordered that if parties desire to proceed with defendants third-party complaint, they shall so advise the Court before Jan. 15, 1970, but any such proceedings will be deferred until completion of arbitration, and this judgment shall constitute an appealable order as to plaintiffs & defendant, filed. DJY,J. Copies 77(d) to all counsel.

1-12-70. Motion for awarding of Attorneys fees, memorandum in support affidavit in support, memorandum in support of motion for Attorneys fees and certification, filed.

1-16-70. Defendants statement of objection to pltf's. motion for attorney fees, filed. Copy mailed.

2-5-70. Notice of appeal, filed. Copies to Murray & Hart.

2-5-70. Bond in the amount of $250.00 for costs with Aetna Casualty & Surety Co., filed.

3-16-70. Order extending time to March 30, 1970 for filing record and docketing the appeal filed. DJY. Copies 77d to Ct. of Appeals, Murray; Maguire.

3-23-70. Order denying plaintiffs' application for assessment of attorney's fees with leave to renew the application after damages have been determined filed. DJY. Copies 77(d) mailed to: Murray, Maguire and Hart on 3-26-70.

3-24-70. Letter and list of exhibits to be included with the record on appeal filed.

3-26-70. Certified record on appeal mailed to the Sixth Circuit Court of Appeals.

4-1-70. Acknowledged receipt from U.S. Court of Appeals, filed 3-30-70, filed. Their #20326.

COMPLAINT.

(Filed January 22, 1968.)

1. This action arises under U.S.C., Title 28, Sections 1336 and 1337; U.S.C., Title 49, Sections 5, 9, and 16, paragraph (12) as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand and no/100 dollars ($10,000.00).

2. Plaintiffs, Richard Nemitz, Martin Riley, L. J. Wuertz and Joseph Fitz, bring this action on behalf of themselves and all other members similarly situated of Cedar Point Lodge No. 844 of the Brotherhood of Railroad Trainmen. The said similarly situated members of Cedar Point Lodge No. 844 number approximately twenty-five (25) and it is, therefore, impracticable to bring them all before the Court; and there are questions of law or fact presented herein which are common to the entire number of similarly situated members of Cedar Point Lodge

No. 844 of the Brotherhood of Railroad Trainmen; the claims of the plaintiffs are typical of the claims of the said class; and the plaintiffs are fairly and adequately protecting the interests of said class.

3. The defendant, Norfolk and Western Railway Co., is a corporation duly organized under the laws of the State of Virginia with its principal place of business in Roanoke, Virginia. During all times herein mentioned, defendant owned and operated in Interstate Commerce a railroad company in and through various states, including Ohio. All the acts of the corporation hereinafter alleged were done by said corporation's agents, acting within the course of their employment and within the scope of their respective duties.

4. By application filed in Interstate Commerce Commission Docket No. 21512 on March 17, 1961, the defendant railway sought authority under U.S.C., Title 49, Section 5(2) to purchase from the Connecting Railway Co. its Sandusky Line of railroad between Hudson Street in Columbus, Ohio, and its terminus of the line in Sandusky, Ohio, together with certain additional trackage in Columbus, Ohio.

5. During all times herein mentioned the Connecting Railway Co. was a Pennsylvania Corporation, with railroad properties in the states of Ohio, Michigan, and Pennsylvania, and at all times herein all of its railroad property was leased to and operated by the Pennsylvania Railroad Co. as part of its system.

6. Included in the Connecting Railway Company's leased property until on or about October 16, 1964, was the aforesaid Sandusky Line, which the Connecting Railway Co. leased to the Pennsylvania Railroad Co., and which made up part of the Pennsylvania Railroad Co.'s Toledo Division.

7. The aforesaid Sandusky Line of railroad at all times herein has been used primarily to move coal from Columbus, Ohio, and points south thereof, to three coal

docks located at Sandusky, Ohio, for transshipment by lake vessel.

8. The principal purpose of the Norfolk and Western Railway Co.'s application with the Interstate Commerce Commission for purchase of the aforesaid Sandusky Line was to enable the Norfolk and Western Railway Co. to extend its line to the shores of Lake Erie, thereby obviating the necessity of sharing revenues with the Pennsylvania Railroad Co. for moving coal from points south of Columbus, Ohio, and elsewhere to the shores of Lake Erie for transshipment by vessel.

9. At all times herein, until on or about October 16, 1964, these plaintiffs were employed by the Pennsylvania Railroad Co. as brakemen in the Toledo Division of that Company, making their homes in Sandusky, Ohio.

10. Until on or about October 16, 1964, these plaintiffs enjoyed all rights in the entire Toledo Division of the Pennsylvania Railroad Co., as to wages, seniority, and conditions of employment under existing agreements between the Pennsylvania Railroad Co. and the Brotherhood of Railroad Trainmen.

11. Prior to October 16, 1964, these plaintiffs, as brakemen for the Pennsylvania Railroad Co., worked on the Sandusky Line at all times during which, in the exercise of their seniority, they were able to hold jobs on the said Sandusky Line in accordance with the seasonal volume of business on that line. When the lakes were frozen or when the business volume was such that they were unable, in the exercise of their seniority, to hold a job on the Sandusky Line, these plaintiffs worked out of other parts of the Pennsylvania Railroad Co.'s Toledo Division; namely, the Toledo, Ohio yards; the Lincoln Park, Michigan yards; or the yards at Tiffin, Ohio. Thereby these plaintiffs were able to work a substantial part of the year near their homes in Sandusky, Ohio; and during times when business was slack due to seasonal factors at Sandusky, Ohio, they were able to commute to work at other parts of the Toledo Division until such time as they were

able, in the exercise of their seniority, to hold a job at Sandusky. In this way, plaintiffs were able for the most part, to work throughout twelve (12) months of the year.

12. On June 24, 1964, the Interstate Commerce Commission approved the defendant railway's aforesaid application for authority to purchase from the Connecting Railway Co. (and its lessee, Pennsylvania Railroad Co.) the aforesaid Sandusky Line. This order, pursuant to recommendations contained in the report of the hearing examiner, and in compliance with U.S.C., Title 49, Section 5(2), imposed certain conditions for the protection of these plaintiffs and all railway labor of the Pennsylvania Railroad Co., who would be adversely affected with respect to their compensation, rules, working conditions, fringe benefits, or privileges pertaining thereto by this transaction.

13. These conditions imposed by the Interstate Commerce Commission so far as pertinent to this cause, were made up of protective provisions contained in agreements entered into on January 10, 1962, between representatives of the defendant railway and the Brotherhood of Railroad Trainmen. The Interstate Commerce Commission incorporated these protective provisions by reference in its order approving the aforesaid application by the defendant railway for purchase of the said Sandusky Line. (A copy of these agreements are attached hereto and marked Plaintiffs' "Exhibit A.")

14. In and by these conditions, defendant railway was required to take into its employment all employees represented by labor organizations signatory to the agreements of January 10, 1962, between the defendant railway and the labor organizations signatory thereto, who between the effective date of that agreement and the date said acquisition was consummated, exercised employment rights on the Sandusky Line, and who elected to accept employment with the defendant railway. (See Plaintiffs' "Exhibit A," page 8.)

15. Said conditions imposed by the Interstate Commerce Commission's order of June 24, 1964, further required that when it was determined that an employee, subject to these terms and conditions, had been adversely affected as to his compensation because of the transaction involved, the adversely affected employee was to receive a "displacement allowance" determined in substance as follows: an affected employee's "displacement allowance" was to be determined by taking the total compensation received by the affected employee for the last twelve (12) months in which he performed service for the Pennsylvania Railroad Co., beginning with the month immediately preceding the month in which it was determined he was adversely affected, such twelve (12) months being referred to as the "test period," and then dividing by twelve (12). If said affected employee's compensation was less in any month because of the transaction involved than the aforesaid "average monthly compensation," he was to be paid the difference, less compensation for any time lost on account of absence to the extent he was not available for service under applicable schedule rules. (See Plaintiffs' "Exhibit A," pages 18 and 19.)

16. Pursuant to the Interstate Commerce Commission's order of June 24, 1964, approving defendant railway's application for the purchase of the Sandusky Line, defendant railway on or about October 1, 1964, in conjunction with the Pennsylvania Railroad Co., notified, in writing, all affected employees of the Toledo Division of the Pennsylvania Railroad Co., that on or after October 16, 1964, defendant railway would assume ownership and operation of that part of the Toledo Division of the Pennsylvania Railroad Co. known as the Sandusky Line; and that accordingly, the employees of the Toledo Division of the Pennsylvania Railroad Co., who had exercised employment rights on the Sandusky Line as hereinabove set forth, were to elect to accept employment on what was to become, on or about October 16, 1964, the Sandusky Line of the Norfolk and Western Railway Co.'s Scioto Di-

vision; or in the alternative, said employees were to remain with the Pennsylvania Railroad Co., thereby retaining all their existing rights in the remaining parts of the Toledo Division of the Pennsylvania Railroad Co.

17. On or before October 16, 1964, these plaintiffs, concurrently notified the defendant railway and the Pennsylvania Railroad Co., in writing, of their decision to take employment with the defendant railway on or after October 16, 1964.

18. On or about October 16, 1964, defendant railway assumed ownership and operation of the said Sandusky Line, which became part of the defendant railway's Scioto Division.

19. As a direct and proximate result of the acquisition of the said Sandusky Line by the defendant railway, these plaintiffs, for many months after October 16, 1964, were adversely affected as to their compensation.

20. These plaintiffs were adversely affected as to their compensation by said transaction either because they were unable, in the exercise of their seniority rights, to hold a job at Sandusky in defendant railway's Scioto Division, or because what jobs they were able to hold at Sandusky yielded less compensation than they had earned during the "test period" provided in the Interstate Commerce Commission's order of June 24, 1964. (See Plaintiffs' "Exhibit A," pages 18 and 19.)

21. As a result of the foregoing, these plaintiffs, pursuant to U.S.C., Title 49, Section 5(2), became entitled to displacement allowances in accordance with the Interstate Commerce Commission's order of June 24, 1964.

22. Defendant railway, as herein more fully appears, has failed to comply with the conditions imposed by the Interstate Commerce Commission's order of June 24, 1964, for the protection of these plaintiffs and others on whose behalf this claim is asserted, who were adversely affected by the aforesaid acquisition by the defendant railway of the said Sandusky Line.

23. Plaintiff, Richard Nemitz's total compensation during the twelve (12) month "test period" provided for in the Interstate Commerce Commission's order of June 24, 1964, was seven thousand and no/100 dollars ($7,000.00). Said plaintiff was, therefore, entitled to an "average monthly compensation" of five hundred eighty-three and 33/100 dollars ($583.33) for each month in which he was adversely affected by the aforesaid transaction. Therefore, said plaintiff was entitled to the difference between five hundred eighty-three and 33/100 dollars ($583.33) and his earnings after October 16, 1964, for each month in which his compensation, in the exercise of his seniority, was less because of the transaction involved than the aforesaid five hundred eighty-three and 33/100 dollars ($583.33) "average monthly compensation."

24. For approximately twenty-four (24) months after October 16, 1964, plaintiff, Richard Nemitz, in the exercise of his seniority, was able to earn a total sum of approximately three thousand three hundred three and 13/100 dollars ($3,303.13) in the Sandusky yards. He thereby became entitled to displacement allowances for that twenty-four (24) month period in the approximate sum of ten thousand six hundred ninety-six and 87/100 dollars ($10,696.87); namely, the difference between his total compensation of three thousand three hundred three and 13/100 dollars ($3,303.13) for the twenty-four (24) month period and the fourteen thousand and no/100 dollars ($14,000.00) displacement allowances provided for in the Interstate Commerce Commission's order of June 24, 1964.

25. Since October 16, 1964, defendant railway has paid plaintiff, Richard Nemitz, the approximate sum of one thousand six hundred eighty-nine and 61/100 dollars ($1,689.61) as displacement allowances; said sum is approximately nine thousand seven and 26/100 dollars ($9,007.26) less than this plaintiff was entitled to in accordance with conditions imposed by the Interstate Commerce Commission's order of June 24, 1964.

26. Plaintiff, L. J. Wuertz, during approximately twenty-four (24) months after October 16, 1964, became entitled to a total displacement allowance of approximately ten thousand and no/100 dollars ($10,000.00); defendant railway has paid said plaintiff approximately one thousand seventy-two and 20/100 dollars ($1,072.20) as displacement allowances since October 16, 1964; said sum is approximately eight thousand nine hundred twenty-seven and 80/100 dollars ($8,927.80) less than this plaintiff was entitled to under the conditions imposed by the Interstate Commerce Commission's order of June 24, 1964.

27. Plaintiff, Martin Riley, during approximately twenty-four (24) months after October 16, 1964, became entitled to total displacement allowances of approximately twelve thousand and no/100 dollars ($12,000.00); defendant railway has paid said plaintiff approximately three thousand four hundred fifty-two and 84/100 dollars ($3,452.84) as displacement allowances since October 16, 1964. Said sum is approximately eight thousand five hundred forty-seven and 16/100 dollars ($8,547.16) less than this plaintiff was entitled to under the conditions imposed by the Interstate Commerce Commission's order of June 24, 1964.

28. Plaintiff, Joseph E. Fitz, during approximately twenty-four (24) months after October 16, 1964, became entitled to total displacement allowances in the approximate amount of six thousand and no/100 dollars ($6,000.00); defendant railway has paid said plaintiff approximately one thousand five hundred fifty-eight and 90/100 dollars ($1,558.90) as displacement allowances since October 16, 1964. Said sum is approximately four thousand four hundred forty-one and 10/100 dollars ($4,441.10) less than this plaintiff is entitled to under conditions imposed by the Interstate Commerce Commission's order of June 24, 1964.

29. Plaintiffs further say that the defendant railway has failed to pay to all other plaintiffs on whose behalf this claim is asserted the full amounts to which they were entitled as displacement allowances under the conditions

imposed by the Interstate Commerce Commission's aforesaid order of June 24, 1964.

30. Plaintiffs say that they were entitled under the Interstate Commerce Commission's order of June 24, 1964, as displacement allowances, an "average monthly compensation" determined by their earnings throughout the entire Toledo Division of the Pennsylvania Railroad Co. during the aforesaid "test period," divided by twelve (12); that by paying these plaintiffs an "average monthly compensation" based upon only their total Sandusky Line earnings during the said "test period" divided by twelve (12), defendant railway, in violation of U.S.C., Title 49, Section 5(2), placed these plaintiffs in a substantially worse position with respect to their employment than they were in prior to the acquisition by defendant railway of the said Sandusky Line.

31. Plaintiffs further say that at all times herein, until approximately March, 1967, they attempted, through the local chairman of Lodge No. 844 of the Brotherhood of Railroad Trainmen, to get defendant railway to pay them in full the displacement allowances to which they became entitled after October 16, 1964, under the terms of the Interstate Commerce Commission's order of June 24, 1964, as herein set forth; that after considerable delay and discussion occasioned substantially by difficulties in procuring the necessary records concerning these plaintiffs' claims, defendant railway in violation of federal law as aforesaid, paid these plaintiffs displacement allowances based only upon those services performed by plaintiffs on the Sandusky Line during the aforesaid "test period" provided in the aforesaid Interstate Commerce Commission's order of June 24, 1964.

WHEREFORE, Plaintiffs demand judgment:

1. That this Court decree these plaintiffs are entitled to displacement allowances from and after October 16, 1964, determined by their total earnings throughout the entire Toledo Division of the Pennsylvania Railroad Co. during the "test period" provided in the Interstate Commerce Commission's order of June 24, 1964.

2. That they be awarded damages as provided in U.S.C., Title 49, Section 9, for the difference between the amounts actually paid as displacement allowances by defendant railway to these plaintiffs and the full amounts to which they are entitled under U.S.C., Title 49, Section 5, and as provided in the Interstate Commerce Commission's order of June 24, 1964.

3. That a special master be appointed at defendant's cost for the purpose of determining all amounts due these plaintiffs and others on whose behalf this claim is asserted, under the terms of the Interstate Commerce Commission's order of June 24, 1964.

4. That the Norfolk and Western Railway Company, its officers, agents, employees, attorneys, and all others acting in concert or participation with them in accordance with provisions set forth in U.S.C., Title 49, Section 16(12) be permanently restrained and enjoined from failing to comply with the Interstate Commerce Commission's order of June 24, 1964.

5. That plaintiffs recover their costs.

THOMAS MURRAY,
Attorney for Plaintiffs.

DEFENDANT'S MOTION TO DISMISS.

(Filed March 11, 1968.)

Defendant respectfully moves the Court for an order to dismiss the Complaint herein for the following reasons:

1. The Court lacks jurisdiction of the subject matter for the reason that exclusive, primary jurisdiction is vested in the National Railroad Adjustment Board under § 3 First of the Railway Labor Act (45 U.S.C.A. § 153 First).

2. The claims set forth in the Complaint herein have been settled by defendant and the bargaining representative of plaintiffs, and plaintiffs' cause of action is therefore barred as a matter of law by reason of an accord and satisfaction.

3. There has been no exhaustion or attempted exhaustion of administrative remedies available to plaintiffs under the applicable agreements between defendant and the Brotherhood of Railroad Trainmen and under § 3 First of the Railway Labor Act.

/s/ JOHN M. CURPHEY,
/s/ ROBISON, CURPHEY & O'CONNELL,
Attorneys for Defendant.

MOTION FOR SUMMARY JUDGMENT BY PLAINTIFFS.

(Filed March 25, 1968.)

Plaintiffs move the Court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a Summary Judgment in Plaintiffs' favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that plaintiffs are entitled to a judgment as a matter of law; or, in the alternative,

2. If Summary Judgment is not rendered in plaintiffs' favor upon the whole case or for all the relief asked and a trial is necessary, that the Court, at the hearing on the motion, by examining the pleadings and the evidence before it and by interrogating counsel, ascertain what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just.

This motion is based upon:

(a) Complaint and Exhibits attached thereto.

(b) Defendant's Motion to Dismiss, admissions contained therein, and Exhibits attached thereto.

(c) Plaintiffs' Motion for Summary Judgment and Exhibits attached thereto.

(d) Affidavits filed herein.

/s/ THOMAS J. MURRAY,
MURRAY & MURRAY,
Attorneys for Plaintiffs.

AMENDMENT OF COMPLAINT BY STIPULATION.

(Filed March 25, 1968.)

It is hereby stipulated and agreed by and between the attorneys for the respective parties herein that the complaint be and the same is hereby amended in the following particulars:

1. Amending Paragraph 1, first sentence to read as follows: "This action arises under U.S.C., Title 28, Sections 1336 and 1337; U.S.C.A., Title 49, Sections 5(2) (f), 8, 9, and 16 (12) as hereinafter more fully appears."

2. By adding to said complaint a paragraph numbered 32 as follows: "Plaintiffs further say that said allowances paid as set forth in paragraph 31 herein were paid to them over protest on their behalf by their local chairman, Joseph Fitz; that they accepted said payments with the understanding that said acceptance in no way prejudiced their rights to seek the full protective benefits due them under 49 U.S.C.A., Section 5 (2) (f); and that through their local chairman, they have at all times herein, taken all steps reasonably available to them in order to receive the payment of aforesaid benefits in full without resort to litigation."

3. Amending demand paragraph No. 1 to read as follows: "That this Court decree these Plaintiffs are entitled to protective benefits in accordance with 49 U.S.C.A., Section 5 (2) (f), for each and every month since the date of the aforesaid acquisition in which they earned a monthly compensation less than the 'average monthly compensation' provided for under the Interstate Commerce Commission's Order of 24 June, 1964."

4. Amending demand paragraph No. 2 to read as follows: "That they be awarded damages as provided in 49 U.S.C.A., Section 9, for the difference between the amounts actually paid them to date as

protective benefits by Defendant Railway, and the full amounts to which they are entitled under 49 U.S.C.A., Section 5 (2) (f), as provided by the Interstate Commerce Commission's Order of 24 June, 1964."

5. Striking out paragraph No. 3 of the demand and inserting in lieu thereof the following: "That this Court compel production of the books and records of Defendant Railway necessary for a prompt determination of the total protective benefits due these Plaintiffs in accordance with 49 U.S.C.A., Section 5 (2) (f) and as provided by the Interstate Commerce Commission's Order of 24 June, 1964."

6. Striking out paragraph 5 of the demand and inserting in lieu thereof the following: "That Plaintiffs recover, in addition to the full amount of damages to which they may be entitled, their costs in full, including a reasonable attorney's fee to be fixed by the Court as part of the costs of this case, in accordance with 49 U.S.C.A., Section 8."

Dated: March 25, 1968.

/s/ THOMAS J. MURRAY
Attorney for Plaintiffs.

/s/ JOHN M. CURPHEY
Attorney for Defendant.

MEMORANDUM RE DEFENDANT'S MOTION TO DISMISS.

(Filed July 25, 1968.)

YOUNG, *J.*:

This is an action brought by plaintiffs, on behalf of themselves and all other members similarly situated of Cedar Point Lodge No. 844 of the Brotherhood of Railroad Trainmen, to recover damages incurred from the defendant railway's alleged violation of conditions imposed upon the parties by the Interstate Commerce Commission on June 24, 1964, and to enjoin further violations of the Commission's order. The cause of action is said by plaintiffs to arise under 28 U.S.C. § 1336 and § 1337, and 49 U.S.C. §§ 5(a)(f), 8, 9, and 16(12).

Defendant railway has filed a motion to dismiss on the grounds that the Court lacks jurisdiction of the subject matter, there has been no exhaustion of administrative remedies by the plaintiffs, and the claims set forth have already been settled by the parties. Defendant accompanied the motion with an affidavit and attached exhibits. On the basis of the complaint and attached exhibits, and on the basis of defendant's motion to dismiss accompanied by supporting material, plaintiffs then filed a motion for summary judgment in their favor, attaching to their motion an affidavit and exhibits. In addition to these pleadings and motions, there have also been numerous reply briefs filed by both parties, urging that their own motions be granted, and attacking the merits of the other party's position in the matter. Since the defendant's motion to dismiss has been accompanied with affidavits and exhibits, and the Court has considered those filings in addition to the bare motion, defendant's motion will be treated as a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, and the plaintiffs' motion as a cross motion for summary judgment.

Before the Court rules on the merits of the cross motions for summary judgment, a brief outline of the facts and history of this case is in order. Plaintiffs are four of

approximately twenty-five similarly situated members of Cedar Point Lodge No. 844 of the Brotherhood of Railroad Trainmen, suing on behalf of the entire class of about twenty-five members who have similar claims against the defendant. Prior to October 16, 1964, these plaintiffs were employed by the Pennsylvania Railroad Co. as Brakemen in the Toledo Division of the Company. Before that date, the Connecting Railway Co. was a Pennsylvania Corporation which leased its railroad properties to the Pennsylvania Railroad, and part of its trackage was known as the Sandusky Line, running from Columbus, Ohio and terminating in Sandusky, Ohio. Up until this date in 1964, plaintiffs as brakemen for the Pennsylvania Railroad Co. worked on the Sandusky Line whenever jobs were available for them there, primarily during those months of the year when Lake Erie was not frozen and shipping was possible. During the rest of the year, plaintiffs worked out of other railroad yards owned by the Pennsylvania Railroad Co. and located in the Toledo Division, so that they were able to work throughout most of the twelve months of the year. Since a substantial part of their work was on the Sandusky Line leased by the Pennsylvania Railroad, these plaintiffs all made their homes in the Sandusky, Ohio area. On March 17, 1961, the defendant railway sought authority from the Interstate Commerce Commission by an application bearing Docket No. 21512 to purchase from the Connecting Railway Co. its Sandusky Line and other trackage in Columbus, Ohio. This application was made under the provisions of 49 U.S.C. § 5(2). On June 24, 1964, the I.C.C. approved the defendant's application for authority to purchase the Sandusky Line from the Connecting Railway Co., and the order granting such authority imposed certain conditions for the protection of employees who might be adversely affected by the purchase, pursuant to the mandate in 49 U.S.C. § 5(2)(f) to attach such conditions to an order before it is approved. These conditions concerned the compensation, rules, working conditions, and fringe benefits of employees affected by the purchase, and were made up from the Washington Job

Protection Agreement of 1936, and an agreement of January 10, 1962, between the defendant railroad company and the Brotherhood of Railroad Trainmen. Pursuant to the terms of these agreements incorporated in the I.C.C. order, plaintiffs elected to take employment with the defendant railway after October 16, 1964, the date set for the transfer of ownership and control of the Sandusky Line to the defendant railway. Since the date of that transfer, plaintiffs have been able to earn only a fractional amount of what they had been earning monthly before the acquisition by working on the Sandusky Line and the other nearby lines of the Pennsylvania Railroad. Plaintiffs contend that the conditions imposed under the I.C.C. order of June 24, 1964, entitle them to a guaranteed wage equal to their average monthly compensation during the year prior to the acquisition, and that their average monthly compensation during that so-called "test period" is to be based upon their earnings throughout the entire Toledo Division of the Pennsylvania Railroad Co. during that year, divided by twelve. Therefore, the plaintiffs contend, any deficit between that average amount earned before the purchase and what they are able to earn now and since the date of purchase, must be reimbursed them under the conditions embodied in the I.C.C. order of approval. The defendant railway has taken the position that the average monthly earnings under the terms of the I.C.C. order are to be determined by taking the plaintiff's earnings during the test year which resulted from work on the Sandusky Line only, and dividing that figure by twelve months to arrive at an average monthly sum. In order to settle this dispute, plaintiffs attempted through the local chairman of Lodge No. 844 of the Brotherhood to receive the compensation which they claim they have coming under the terms of the I.C.C. order. The defendant railway, however, only paid the plaintiffs displacement allowances based upon a monthly average of earnings from work on the Sandusky Line during the test year, and at that point the plaintiffs brought the controversy to this Court.

In their motion for summary judgment, plaintiffs con-

tend that the pleadings, affidavits, and admissions on file show that there is no genuine issue as to any material fact, and that since the defendant has placed them "in a worse position with respect to their compensation" in violation of 49 U.S.C. § 5(2)(f) by not complying with the I.C.C. protective conditions, they are entitled to recover their damages as a matter of law. Plaintiffs request that a special master be appointed to determine the amounts due and owing to them from defendant's non-compliance with the I.C.C. order, that the Court compel production of the books and records of defendant railway in order that such a determination may be promptly made, that the defendant railway and its agents be permanently enjoined from failing to comply with the I.C.C. order, and that plaintiffs recover in addition to damages their costs and reasonable attorney's fees under 49 U.S.C. § 8.

In its motion to dismiss, defendant first contends that this Court lacks jurisdiction of the subject matter, in that primary jurisdiction is vested in the National Railroad Adjustment Board under 45 U.S.C. § 153. Where the dispute involves the interpretation and application of collective bargaining agreements and other labor agreements, defendant states that the National Railroad Adjustment Board not only has primary jurisdiction, but mandatory and exclusive jurisdiction as well, and cites numerous holdings of the United States Supreme Court to that effect. Plaintiffs do not dispute that these cases are the law and set forth the general rule of exclusive jurisdiction of railroad labor disputes in the Adjustment Board, but instead contend that this suit falls within a statutory exception to that rule. Plaintiffs contend that they are not seeking to invoke this Court's jurisdiction to hear a dispute arising out of an ordinary labor agreement between a railroad and the Brotherhood, but rather are suing to recover damages on the ground that the defendant railroad has violated certain conditions imposed by the Interstate Commerce Commission upon the parties, and are also seeking to enjoin further violations of these conditions. When defendant railroad purchased the Sandusky Line which the

plaintiffs had been working on for the Pennsylvania Railroad, it was participating in a transaction authorized by 49 U.S.C. § 5(2) and § 5(2)(f) of that chapter provides:

> "(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interest of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

Plaintiffs contend that the above language not only *authorizes* the I.C.C. to attach conditions to their orders under this chapter, but that Congress has given the Commission a *mandate* to do so. The June 24, 1964, I.C.C. order approving the Norfolk and Western's purchase of the Sandusky Line incorporated by reference at pages 72 and 73 conditions designed to protect the interests of the employees affected, thus complying with the requirements of the statute. These conditions were based upon agreements of understanding made between the defendant and the Brotherhood of Railroad Trainmen on January 10, 1962, and also provisions of the Washington Job Protection Agreement of 1936, in order that any situations not covered by the former provisions would be taken care of by

the latter. Plaintiffs claim that they have been adversely affected with respect to their employment as a direct result of the defendant's purchase of the Sandusky Line, and that therefore they are entitled to damages under 49 U.S.C. § 9, and an injunction under the provisions of 49 U.S.C. § 16(12). Section 9 provides:

> "Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

Section 16(12) of Title 49 provides:

> "If any carrier fails or neglects to obey any order of the commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to any district court of the United States of competent jurisdiction for the enforcement of such order.

> If, after hearing, such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same."

Plaintiffs contend that these two statutory provisions, reinforced by 28 U.S.C. §§ 1336 and 1337, establish jurisdiction in the district courts for a cause of action seeking damages and an injunction. Plaintiffs argue that any claim by the defendant that the Interstate Commerce Act is not paramount over the Railway Labor Act is dispelled by both 49 U.S.C. § 5(11) and the case law. Section 5(11) provides in pertinent part as follows:

> "The authority conferred by this section shall be exclusive and plenary, * * * and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. * * *"

With regard to the defendant's jurisdictional argument, plaintiff places primary reliance upon the case of *Brotherhood of Loc. Eng'rs. v. Chicago & Northwestern R.R.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963). The problems before the Eighth Circuit Court of Appeals,

insofar as they are relevant to the instant case, are perhaps best stated by the trial court, reported as *Chicago & Northwestern R.R. v. Brotherhood of Locomotive Eng'rs.*, 202 F. Supp. 277, 283 (S.D. Iowa 1962):

> "The basic question presented herein is, whether the parties are required to follow the procedures of the Railway Labor Act (45 U.S.C.A. § 151 et seq.) in effecting the proposed coordination of Northwestern's railroad yards at Marshalltown, Iowa, or whether the parties are required to follow the procedures prescribed by the 'stipulation' entered into by the parties and authorized by the Interstate Commerce Commission in its order approving the merger under the provisions of Section 5(2) (f) and Section 5(11) of the Interstate Commerce Act, 49 U.S.C.A. §5(2) (f), 5(11)."

The District Court held that the Railway Labor Act was inapplicable, and that the parties were required to follow the procedures in the stipulation incorporated in the I.C.C. order.

The Court of Appeals, in affirming the decision of the District Court, considered the policy reasons behind the enactment of § 5(2) (f), and the effect which the Railway Labor Act would have upon Section 5 transactions, noting especially the defeat of the Harrington Amendment. That amendment would have required disapproval of any transactions which would cause *any* change in the existing employment rights of affected employees, and was seen as having the effect of preventing all consolidations to which it related. *Railway Labor Executives' Association v. United States*, 339 U.S. 142, 151 (1950). The 8th Circuit went on to state at page 430:

> "The Harrington amendment was defeated. We believe that that italicized sentence clearly points out the Court's view that the ICC power to authorize mergers would be completely ineffective if authority to adjust work realignments through fair compensation did not exist. * * * Like the Harrington amend-

> ment, the Railway Labor Act, if it applied, would threaten to prevent many consolidations."

The defendant in the instant case argues that because the *Northwestern* case involved a "major dispute" within the framework of the Railway Labor Act, and this case involves a "minor dispute," the two fact situations are distinguishable. In the *Northwestern* case, the defendant union urged that the dispute was a major dispute which must be resolved according to the procedures set out in § 6 of the Railway Labor Act. The Court stated at page 428:

> "We do not deem it necessary to determine whether the dispute here involved is major or minor within the meaning of the Railway Labor Act. * * * If either a major or minor dispute exists here and if the Railway Labor Act applies under the present factual situation, exclusive jurisdiction for resolution of the dispute would rest in the instrumentalities established by the Railway Labor Act."

Of course, the Court of Appeals went on to affirm the trial court's holding that the parties were relieved from the requirements of the Railway Labor Act by virtue of 49 U. S. C. § 5(11), so the classification of disputes by the Railway Labor Act was never an issue in the case. Similarly, in the case at bar, this Court cannot accept the contention that the classification of this dispute as minor serves to distinguish this case from *Northwestern,* nor can it agree with the defendant's statement that there is nothing in that opinion which is inconsistent with the Railroad's claim here that exclusive jurisdiction lies with the Adjustment Board. While it is generally true that no two cases are exactly alike, and the *Northwestern* case when compared to the instant controversy is not an exception to that general rule, they are enough alike in all material respects that the case is authority for the plaintiff's position here on the question of jurisdiction. The *Northwestern* court, after considering three Supreme Court cases dealing with legislative history and public

policy reasons behind the enactment of 49 U.S.C. § 5(2) [*Brotherhood of Maintenance Ass'n Employees v. United States,* 366 U.S. 169 (1961); *Railway Labor Executives' Ass'n v. United States,* 339 U.S. 142 (1950); *United States v. Lowden,* 308 U.S. 225 (1939)], stated at page 431:

> "While the three Supreme Court cases just discussed do not deal directly with the specific problem now confronting us (namely, whether the provisions relating to merger and providing for compensation for affected employees take precedence over the provisions of the Railway Labor Act) in the situation here presented we believe that the cases afford very substantial support for the view that Congress intended the I.C.C. to have jurisdiction to prescribe the method for determining the solution of labor problems arising directly out of approved mergers. Thus, like the trial court, we come to the conclusion that to hold otherwise would be to disregard the plain language of Section 5(11) conferring exclusive and plenary jurisdiction upon the I.C.C. to approve mergers and relieving the carrier from all other restraints of federal law.
>
> "Unquestionably, the Railway Labor Act is a federal law. We find no express or implied exception of the provisions of the Railway Labor Act from the operative provisions of Section 5(11)."

As the Court points out in a footnote,[1] Congress has demonstrated its ability expressly to exclude the Railway Labor Act from the operation of a statute such as 49 U.S.C. § 5, for the proviso attached to Title I § 10(a) of the Emergency Railroad Transportation Act of 1933 does exactly that.[2] The omission of any such proviso in § 5(11) indicates a congressional intent to include the Railway Labor Act as a "federal restraint" from which the parties to an I.C.C. § 5(2) proceeding are relieved. Defendants argue further, however, that even if a suit based upon a

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[1] 314 F.2d 424, 432 n. 2 (8th Cir. 1963).

[2] 48 Stat. 211, 215.

Section 5(2) I.C.C. order may be properly brought in a District Court, the instant suit is based upon alleged violations of a collective bargaining agreement between the railroad and the union, such as is contemplated by the last sentence of § 5(2)(f), and not upon any I.C.C. order. Therefore, the argument runs, the National Railroad Adjustment Board has exclusive jurisdiction, since the cause of action is based upon an ordinary collective bargaining agreement. Defendant cites the case of *Arnold v. Louisville & Nashville Rd. Co.*, 180 F. Supp. 429 (M.D. Tenn. 1960), *aff'd sub. nom. Batts v. Louisville & Nashville Rd. Co.*, 316 F.2d 22 (6th Cir. 1963), as direct authority for this proposition. The last sentence of § 5(2)(f) provides as follows:

> "Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

Plaintiffs do not dispute that this language contemplates the making of subsequent agreements between the parties to a merger or acquisition, and that if such later contracts are not incorporated into the § 5(2)(f) order, then suits upon them are upon the contract and not upon the order. Plaintiffs instead contend that since the agreement here was made in 1962, and incorporated in the order in 1964, the provisions of the agreement which are the basis of the suit were not made "hereafter," but rather are an integral part of the original order. Defendant suggests that the word "hereafter" is intended to mean after the date of enactment of the section, and that when a suit is based upon any agreement between the parties to the Section 5 transaction, and not upon provisions having an independent source from party contracts which are merely inserted by the I.C.C. as "boilerplate" provisions, then *Arnold, Batts,* and the Railway Labor Act require the plaintiffs to proceed upon the private agreement in the normal fashion. That is, defendants contend that in such a case, plaintiffs

must exhaust all remedies in the agreement and then proceed to their remedies under the Railway Labor Act, and they are not entitled to sue upon the order in the federal courts. This Court does not read *Arnold, Batts,* and *Cantrell*[3] to hold that the Railway Labor Act divests this Court of jurisdiction in cases of this nature. These cases instead stand for the proposition that plaintiffs suing upon an agreement made after the I.C.C. order but incorporated within it, are compelled, notwithstanding the provisions in Title 49 allowing suits in the District Courts, to exhaust any remedies found within the agreement before they may be heard in court. An important distinction between *Arnold* and the instant case is that the former involved a situation where the parties to the I.C.C. order supplemented the protective conditions contained in that order with a subsequent agreement. Clearly the District Court had to hold them bound by the arbitration provisions of that later agreement and not allow suit on the former provisions alone, else subsequent agreements and the last sentence of § 5(2).(f) alluded to above would be rendered meaningless. This Court is unable to agree with the defendant that the intended purport of the word "hereafter" is after the enactment of the section, instead of after the date of entry of the I.C.C. order. The language of the opinions in *Arnold* and *Batts* does not even support this interpretation, nor do the other cases cited by both parties which deal with § 5(2)(f). In an additional case involving a clash between the policies of the Interstate Commerce Act and the Railway Labor Act, a federal court had occasion to consider the decision in *Arnold,* and the *Arnold* Court's interpretation of the sentence at issue, stating:

> "The proper meaning of this clause, we believe, was provided in *Arnold v. Louisville & Nashville Rd., supra.* There the Court decided that any supplementary agreement between the authorized representative and the carriers must be *adoptive, supplementive*

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[3] *Cantrell v. Louisville & Nashville Rd. Co.,* 316 F.2d 22 (6th Cir. 1963); (a companion case to *Batts, supra*).

> or *implementive,* and that any agreement must deal with the same subject matter as the I.C.C. order. * * *"[4]

It is apparent that the *Clemens* court, as well as the *Arnold* court, interpreted the word "hereafter" in § 5(2)(f) to refer to agreements entered into after the date of the I.C.C. order, and this Court is similarly of the opinion that such a construction is the only proper one. In *Clemens, supra,* the I.C.C. order approving an acquisition included the protective terms of the Washington Job Protection Agreement of 1936, and at a later date, the unions and railroads involved entered into an agreement which seriously abrogated the benefits due employees upon retirement at age sixty-five. One of the many issues presented by the case was whether the plaintiffs, employees who had been terminated at age sixty-five without pay pursuant to this new agreement, could bring their claims of being entitled to benefits under the original I.C.C. order in the federal courts under 28 U.S.C. § 1336. That, of course, is one of the jurisdictional sections invoked by plaintiffs here, and the defendant here, as in *Clemens,* is arguing that the *Arnold* and *Batts* cases preclude jurisdiction in the courts. On this issue, the Court's statement, in pertinent part, was as follows:

> "The plaintiffs rely also on 28 U.S.C. § 1336 which they contend provides an alternate ground of jurisdiction. * * * The defendants argue that *Arnold v. Louisville & Nashville Rd.,* 180 F. Supp. 429 (M.D. Tenn. 1960), *aff'd sub nom. Batts v. Louisville & Nashville Rd. Co.,* 316 F.2d 22 (6th Cir. 1963) supports their contention that this section also does not confer jurisdiction. This argument must be rejected.
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> "In *Arnold,* * * * the Court held that the action could not be sustained under 28 U.S.C. § 1336. Specifically, the Court held that the plaintiffs' rights were founded not upon the I.C.C. order but upon a sub-

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[4] *Clemens v. Central Railroad Company of New Jersey,* 264 F. Supp. 551 (E.D. Pa. 1967).

> sequent agreement entered into by the unions and carrier *supplementing* that order. The agreement in *Arnold* was significantly different from that in the instant action, because it did not undertake to abrogate any benefits imposed by the Commission for the protection of adversely affected employees, but, on the contrary, sought to supplement them. * * *" (264 F. Supp. 551, 560,)

It must be kept in mind that in the case at bar, plaintiffs are not suing upon *any* agreements which supplement, implement, or abrogate an I.C.C. order: they are suing upon the order itself, and the protective terms originally embodied within it.

The plaintiffs cite *Swacker v. Southern Ry. Co.*, 360 F.2d 420 (4th Cir. 1966), as well as other federal cases, in support of the proposition that suits upon I.C.C. Section 5 orders are properly brought in the federal district courts. Defendant attempts to distinguish *Swacker* from the case at hand on the ground that the protective order there did not contain provisions derived from agreements between the parties, but rather from the *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271. This Court is unable to see what legal effect should be attached to the *source* of the conditions imposed by the Commission pursuant to the mandate of Section 5(2)(f). Whether the protective terms have their genesis in other merger cases, or prior agreements between the parties subject to the order of approval about to be entered by the Commission, should make no difference; the provisions set forth or incorporated by reference in the original I.C.C. order form the basis of the employees' rights. *Brotherhood of Locomotive Engineers v. Chicago & Northwestern Railway Company, supra,* involved a situation where the protective provisions of the I.C.C. order were based upon a stipulation between the carrier and representatives of the employees, entered into before the order but incorporated within it, and the Court held that it *had* jurisdiction to enforce the terms and conditions of that order. The distinction which the defendant seeks to impose here, based

upon the source of the protective provisions, is not supported by either Title 49, the case law, or reason, and accordingly must be rejected.

In summary, the first branch of defendant's motion to dismiss, based upon the contention that the Court lacks jurisdiction of the subject matter, is not well taken, and will be overruled to that extent.

Defendants also contend that the suit should be dismissed because the plaintiffs have failed to exhaust their administrative remedies. Defendants argue that Section 1(d) of the agreement between the parties made in 1962 contains an arbitration clause, and the plaintiffs have not shown an exhaustion of this remedy. Even if they have exhausted the contractual remedies, or are excused from doing so by the union's inactivity on their behalf, the defendant further contends that plaintiffs have not exhausted their remedies before the Railroad Adjustment Board pursuant to Section 3 First (i) of the Railway Labor Act. Defendant cites several United States Supreme Court cases and an Ohio case as authority for the proposition that administrative remedies must be exhausted before a party may seek judicial relief. Defendant's argument that the plaintiffs have not exhausted their remedies before the Railroad Adjustment Board is clearly untenable in the face of 49 U.S.C. § 5(11) and this Court's holding that plaintiffs are relieved from the restraints of the Railway Labor Act. With regard to defendant's contention that the plaintiffs have not exhausted their administrative remedies under the incorporated agreement of 1962 and other union procedures, a reading of the affidavit of Joseph E. Fitz, local chairman of Lodge 844, reveals that these plaintiffs have reached a deadend street in their attempts to utilize internal union remedies. The doctrine of exhaustion of administrative remedies presupposes the *existence* of adequate and effective remedies. *Marsh v. County School Board of Roanoke County, Va.*, 305 F.2d 94, 98 (4th Cir. 1962). The only remedy which the plaintiffs even arguably should have to exhaust is the provision for arbitration in Section 1(d) of the 1962 agreement, and it does

appear that in many of the cases cited by both parties, the courts, although taking jurisdiction, have required arbitration pursuant to the provision in the I.C.C. order. However, in all the cases this Court has considered where the arbitration clause was *permissive* in language rather than mandatory, as it is in the instant case, one of the parties to the litigation was actively seeking to arbitrate the dispute. The holdings of these various courts are not that arbitration must be utilized in all cases before a party can bring the claim before the federal courts on the merits, but rather that where one of the parties has *invoked* the arbitration clause exercising his election under the permissive language, then the dispute *must* be settled by an arbitrator, or the clause would be meaningless.[5] In the case at bar, the plaintiffs through their local chairman attempted in vain to invoke the arbitration clause, and failing to have their claims adjudicated in that manner, now have exercised their right of election to pursue their statutory remedies in the courts. The defendant not having exercised its right to "refer such dispute to an arbitration committee for consideration and determination," the arbitration clause has not taken on a mandatory character under the cases cited in the above footnote. Plaintiffs here are attempting to pursue a remedy specifically created by Congress in 49 U.S.C. §§ 9, 16(12). These statutory provisions are clear on their face, and make no reference to any administrative exhaustion as a mandatory prerequisite. Undoubtedly, Congress in its wisdom foresaw the likelihood of railroad mergers and acquisitions resulting in economic chaos for the employees affected, and political upheaval within the Brotherhood's local lodges. Employees in such a transitory process are in all probability going to find themselves in a weaker position than those not affected with respect to exerting influence upon their bargaining

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[5] *New Orleans and North Eastern R.R. Co. v. Bozeman*, 312 F.2d 264, 268 (5th Cir. 1963); *Batts v. Louisville and Nashville R.R. Co.*, 316 F.2d 22, 26 (6th Cir. 1963); *Brotherhood of Railroad Trainmen v. Chicago River and Indiana R.R.*, 353 U.S. 30, 34, 35 (1957); *Gillikin v. Atlantic & East Carolina Ry.*, 120 S.E.2d 847, 858, 255 N.C. 228 (1961).

representatives. To avoid undue hardships to these employees from conditions not of their own making, Congress has empowered the I.C.C. to insert provisions for their protection before any such transactions are approved, and allowed the employees affected to come into the federal courts with their claims, exempting them for a short period from the normal avenues of settling railway labor disputes. Indeed, the very situation presented to this Court is probably characteristic of that which Congress envisaged when it enacted 49 U.S.C. §§ 5, 8, 9, and 16, and 28 U.S.C. §§ 1336, 1337. For the reasons above, then, it is the opinion of this Court that the plaintiffs are not required to exhaust any other remedies, and have properly presented their claims in a "district court of the United States of competent jurisdiction."

The defendant in its motion to dismiss has also raised a claim of accord and satisfaction, in that the plaintiffs' claims have all been settled. The defendant has attached to its motion the affidavit of Fred S. Yancey, Wage Supervisor for the Norfolk and Western Railway, and various exhibits. Since this amounts to an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure, it cannot be the basis of a motion to dismiss. *Topping v. Fry*, 147 F.2d 715 (7th Cir. 1945). However, Rule 12(b) expressly provides that when such a defense is accompanied by affidavits and exhibits such as is the case here, it may be treated as a motion for summary judgment under Rule 56. The defendant's affidavit states that "all merger-connected claims filed on behalf of the plaintiffs named in this action have been disposed of by agreement between the representative of the Norfolk and Western and the General Chairman of the Brotherhood of Railroad Trainmen, and no dispute exists," and several of the exhibits attached are copies of correspondence concerning the payment of sums allegedly owing these plaintiffs. Plaintiffs, however, contend that there was never any intent on their part to accept the amounts they received as anything else but a partial payment of what is owed them under the I.C.C. order.

When a defendant pleads the affirmative defense of accord and satisfaction, it assumes the burden of establishing that defense, *Scheanwald v. Economy Savings & Loan Company,* 189 N.E.2d 731 (Ohio App. 1960) and it has gone forward by setting forth facts upon which this defense could be made out. Since there appears to be a bona fide dispute between these parties, resulting in an unliquidated amount being owed the plaintiffs under the I.C.C. order, settlement for a lesser sum could form an accord and satisfaction as settlement of the dispute would constitute the consideration. *Chandler v. State Highway Bd.,* 61 F.2d 601 (5th Cir. 1932). However, it is also established law that there can be no accord and satisfaction of a disputed claim unless the creditor accepts the lesser amount with the *intention* that it constitute a settlement of the claim, *Vilter Mfg. Co. v. Rolaff,* 110 F.2d 491, 498 (8th Cir. 1940), and the plaintiffs here allege that there was never any such intention, raising a material question of fact. A plaintiff's motion for summary judgment must be denied if affirmative defenses raise matters, which, if proven, may possibly preclude a judgment in favor of the plaintiff as a matter of law, *Velsicol Corporation v. Hyman,* 103 F. Supp. 363, 366 (D. Colo. 1961), and the defendant can not contend that it has established the defense from its affidavits and exhibits, in the face of the plaintiffs' claims of there being no intention to settle. Therefore, neither of the cross motions for summary judgment on this matter may be granted. At this time, the Court will reserve its ruling upon the plaintiffs' rights under the actual terms incorporated in the I.C.C. order. Plaintiffs' prayer for a special master and injunctive relief of a permanent nature cannot be granted in summary fashion, since their rights upon the order have not yet been determined, and questions of fact remain to be resolved. Therefore, both of the parties' motions for summary judgment must be denied. An order will be prepared accordingly.

/s/ DON J. YOUNG,
United States District Judge.

Toledo, Ohio.

ANSWER.

(Filed September 4, 1968.)

First Defense.

For its Answer to plaintiffs' Complaint as amended, defendant pleads as follows:

1. Defendant denies each and every allegation contained in paragraph 1 of the Complaint.

2. For want of knowledge, defendant denies each and every allegation contained in paragraph 2 of plaintiffs' Complaint.

3. Defendant admits the allegations contained in paragraphs 3, 4, 5, 6 and 7 of plaintiffs' Complaint.

4. Defendant denies each and every allegation contained in paragraph 8 of plaintiffs' Complaint.

5. Defendant admits the allegations contained in paragraph 9 of plaintiffs' Complaint.

6. Defendant denies each and every allegation contained in paragraphs 10 and 11 of plaintiffs' Complaint.

7. Defendant admits the allegations contained in paragraphs 12, 13, and 14 of plaintiffs' Complaint.

8. Defendant denies each and every allegation contained in paragraph 15 of plaintiffs' Complaint.

9. Defendant admits the allegations contained in paragraphs 16, 17, 18 and 19 of plaintiffs' Complaint.

10. Defendant denies each and every allegation contained in paragraphs 20, 21, 22, 23 and 24 of plaintiffs' Complaint.

11. Defendant admits that it has paid to plaintiff Richard Nemitz the sum of $1,689.61, to plaintiff L. J. Wuertz the sum of $1,072.20, to plaintiff Martin Riley the sum of $3,452.84, and to plaintiff Joseph Fitz the sum of $1,558.90, all as alleged in paragraphs 25, 26, 27 and 28 of plaintiffs' Complaint, but defendant specifically denies each and every other allegation contained in said paragraphs 25, 26, 27 and 28 of plaintiffs' Complaint.

12. Defendant denies each and every allegation contained in paragraphs 29 and 30 of plaintiffs' Complaint.

13. Defendant admits the allegations contained in paragraph 31 of plaintiffs' Complaint except for the language, "defendant railway in violation of federal law as aforesaid," contained in line 9 thereof, which defendant specifically denies.

14. Defendant denies each and every allegation contained in paragraph 32 of plaintiffs' Complaint.

Second Defense.

15. All of the merger-connected claims of plaintiffs and others similarly situated have been settled by agreement between defendant and plaintiffs' duly authorized agent, Brotherhood of Railroad Trainmen, through its duly designated General Chairman, J. F. McNeel, acting within the scope of his authority.

16. Said settlement agreement was entered into because of a bona fide dispute over the claims of plaintiffs and others similarly situated and defendant. The consideration supporting said settlement agreement was certain sums of money paid to plaintiffs and others similarly situated in return for promises by plaintiffs' said agent that plaintiffs and others similarly situated would withdraw their said claims. Said payments were accepted by plaintiffs and others similarly situated in full satisfaction of their claims against defendant.

17. As a result of the said settlement agreement and acceptance of the said sums by plaintiffs and others similarly situated, there has been a full accord and satisfaction between defendant and plaintiffs and others similarly situated.

Third Defense.

18. Defendant incorporates the allegations contained in paragraphs 15, 16 and 17 hereinabove as if fully rewritten herein.

19. Further pleading, defendant says that Brotherhood of Railroad Trainmen, in entering the said settlement agreement, was, in accordance with the provisions of the Washington Job Protection Agreement of 1936, the merger agreement designated as plaintiffs' Exhibit A, and other documents, held out as the authorized agent of plaintiffs and others similarly situated and was acting within the scope of that authority; that defendant relied upon that authority to its detriment; and, that as a result, plaintiffs and others similarly situated are estopped to deny such authority of the said Brotherhood of Railroad Trainmen even if such authority, in fact, did not exist.

Fourth Defense.

20. Further pleading, defendant says that the Court lacks jurisdiction of the subject matter for the reason that exclusive, primary jurisdiction is vested in the National Railroad Adjustment Board under § 3 First of the Railway Labor Act (45 U.S.C.A. § 153 First).

Fifth Defense.

21. Further pleading, defendant says that there has been no exhaustion or attempted exhaustion of administrative remedies available to plaintiffs under the applicable agreements between defendant and the Brotherhood of Railroad Trainmen under § 3 First of The Railway Labor Act.

WHEREFORE, defendant prays that plaintiffs' Complaint be dismissed at their costs.

/s/ JOHN M. CURPHEY,
/s/ ROBISON, CURPHEY & O'CONNELL,
Attorneys for Defendant.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.

(Filed August 7, 1969.)

Plaintiff moves the Court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in the complainants' favor as to the second and third defenses set forth in the defendant's Answer, on the ground that there is no genuine issue as to any material fact with respect to these defenses and that complainant is entitled to judgment as a matter of law.

/s/ THOMAS J. MURRAY,
MURRAY & MURRAY,
Attorneys for Complainants.

STIPULATION AND ORDER.

(Filed August 21, 1969.)

It is stipulated and agreed by and between counsel for the respective parties hereto that copies of agreements identified below, attached hereto and marked as indicated, may be received in evidence at the trial of this cause without further proof as to authenticity. It is also agreed that like copies similarly marked may be used during depositions prior to trial without further identification and that the copies attached hereto may be used in connection with any motions hereafter filed. It is further agreed that the descriptions of the joint exhibits contained herein are made solely for the purpose of identifying the documents involved and that the descriptive language is in no way intended to bear upon or affect the legal significance of the contents of these documents; and the parties signatory hereto waive any right to use any descriptive language for any purpose whatever with respect to this cause other than for the sole purpose of identifying the exhibits involved.

Joint Exhibit 1. Agreement for the protection of employees effective January 10, 1962, between the Norfolk and Western Railway Company and 20 national labor organizations in the event of approval of merger and related applications filed by Norfolk and Western and other carriers in I.C.C. finance docket Nos. 21510, etc. consisting of 14 pages without attached appendices.

Joint Exhibit 2. Memorandum of Understanding effective January 10, 1962, between the same parties providing in paragraph 1 thereof for advance notice in case of furloughs, etc. (four pages).

Joint Exhibit 3. Memorandum of Understanding effective January 10, 1962, between the same parties providing that the Agreement for the protection of employees shall not be construed to limit the rights of the parties to change agreements through national handling in the industry (two pages).

Joint Exhibit 4. Memorandum of Understanding effective January 10, 1962, between Norfolk and Western and four operating organizations providing a formula for the determination of displacement allowances (three pages).

Joint Exhibit 5. Stipulation and Agreement undated providing that the Agreement for the protection of employees shall be applied for their protection in the event the Commission approves pending applications, notwithstanding opposition of the labor organizations (two pages).

Joint Exhibit 6. Interstate Commerce Commission report decided June 24, 1964, Norfolk and Western Railway Company and New York, Chicago and St. Louis Company—merger, etc.

Joint Exhibit 7. Memorandum of Understanding dated October 9, 1964, between Norfolk and Western Railway Company and the Brotherhood of Railroad Trainmen, Brotherhood of Locomotive Engineers, and Brotherhood of Locomotive Firemen and Enginemen, providing for the orderly transition of Pennsylvania employees who elected

to accept employment with the Norfolk and Western pursuant to the agreement for the protection of employees represented by Joint Exhibits 1 through 4 herein.

Joint Exhibit 8. Implementing Agreement dated October 27, 1964, between Norfolk and Western and the Brotherhood of Railroad Trainmen providing that Norfolk and Western would take into its employment the employees listed in attached "Exhibit A" who were eligible under the provisions of Section 3 of the Agreement represented by Joint Exhibit 1 herein.

Joint Exhibit 9. Implementing Agreement 1-A between Norfolk and Western and the Brotherhood of Railroad Trainmen and Brotherhood of Locomotive Firemen and Enginemen.

Joint Exhibit 10. Letter of Understanding from the Norfolk and Western to the Brotherhood of Railroad Trainmen dated October 25, 1965, providing for temporary compensation under existing agreements for the protection of the employees.

Notice by the Clerk under Rule 77(a) F.R.C.P. is hereby waived.

IT IS SO ORDERED.

/s/ DON J. YOUNG,
United States District Judge.

/s/ THOMAS J. MURRAY,
/s/ MURRAY & MURRAY,
Attorneys for Plaintiff.

/s/ JOHN M. CURPHEY,
/s/ ROBISON, CURPHEY & O'CONNELL,
Attorneys for Defendant and Third Party Plaintiff.

/s/ ROBERT HART,
Attorney for Third Party Defendant.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

(Filed September 2, 1969.)

Defendant, Norfolk and Western Railway Company, respectfully moves this Court for an order granting a summary judgment in its favor under Federal Rule 56 for the reason that the Court has no jurisdiction over the subject matter, and therefore there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law.

/s/ JOHN M. CURPHEY,
/s/ E. THOMAS MAGUIRE.

OPINION OF THE COURT.

(Filed December 19, 1969.)

YOUNG, *J.*

On October 16, 1964 the New York, Chicago & St. Louis Railroad (hereinafter referred to as the Nickel Plate) was merged into the Norfolk & Western Railway (hereinafter referred to as the N&W) with the N&W as the surviving entity. The transaction involved the assumption of control of several smaller lines by the combined company. Among these was the so-called Sandusky Line from Columbus, Ohio, to Sandusky, Ohio, purchased from the Connecting Railroad which was a subsidiary of the Pennsylvania Railroad[1] (hereinafter referred to as the Pennsy). The Sandusky Line, although legally a separate entity, had been operated as a part of the Toledo Division of the Pennsy. The seniority district of at least one union, The Brotherhood of Railroad Trainmen here involved, embraced the entire Toledo Division. Trainmen not able to

[1] It is interesting to note that the Pennsy at that time controlled the N & W by virtue of ownership of a large portion of its stock. It is also interesting to note that the President of the N & W at the time of the merger was soon thereafter made President of the Pennsy.

find work on the Sandusky Line could and according to the undisputed evidence did indeed seek work at other points in the Toledo Division.

The effect of the merger was to split this seniority district, thereby limiting the Sandusky Line employees to the work available on the Sandusky Line alone. It is this splitting of the seniority district which laid the basis for the present controversy.

The Sandusky Line, while carrying a large amount of agricultural products and general merchandise, was heavily employed for transporting coal to the Pennsy's coal docks at Sandusky. Navigation on Lake Erie being primarily a seasonal matter, much of the employment on the Sandusky Line was seasonal in nature. In light of the total wages which the plaintiffs claim to have received on the Pennsy, the ability to work throughout the Toledo Division must have been of great economic importance to them.[2]

The N&W was desirous of obtaining the Sandusky Line since it provided a much needed connection between the existing N&W rail head at Columbus and the Nickel Plate system. Since the N&W was primarily a coal carrier, it had the added advantage of providing the N&W with a single line potential for its coal shipments, thereby eliminating rate sharing.

At the time of the merger the employees of the Sandusky Line were given the option of going with the N&W or remaining in the employment of the Pennsy. Where an employee elected to take employment with the Pennsy, the Pennsy employee displaced thereby would have the option of electing to take employment with the N&W on the same terms as the employee who displaced him.

Prior to the completion of the merger the unions entered into an agreement with the N&W regarding protective provisions for the employees affected by the merger.

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[2] Plaintiff Richard Nemitz received a total wage from the Pennsy in the 12 months preceding October 16, 1964 of $7,000 and after the merger he earned on the Sandusky Line in the 24 month period following October 16, 1964 an amount of $3,303.13.

These are before the Court as Joint Exhibits 1 through 4. Such agreements are entered into to provide the basis for the protective order which the Interstate Commerce Commission (hereinafter referred to as the I.C.C.) is required to enter by statute. 49 U.S.C. § 5(2)(f) reads:

> As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

These agreements applied to all of the employees on all of the lines affected by the merger with the exception of the A.C.Y.R.R. and the Pittsburgh & West Virginia R.R. The Commission adopted them as part of its protective order:

> Based upon studies made on the Norfolk & Western, Nickel Plate, and Wabash for the 5-year period 1956 through 1960 respecting the usual turnover in employment by reason of retirements, resignations,

deaths, and dismissals for cause, it appears that the proposed merger, lease, and purchase would have little or no adverse effect on the carriers' employees. The studies reveal that the turnover, termed "normal attrition," averaged 4,314 employees annually for the 5-year period. Based upon that average and the plan of operation to be undertaken by the new system, applicants expect that substantially more jobs will become available on the combined system within one year after the unification than the net number of jobs expected to be eliminated as a result thereof.

Norfolk & Western has entered into an agreement with 19 of the principal labor organizations, members of the Railway Labor Executives' Association, for the protection of employees of Norfolk & Western, Nickel Plate, and Wabash, as well as persons employed on the Sandusky line of Pennsylvania, represented by these organizations. This agreement, which provides for the assumption by Norfolk & Western of all outstanding labor contracts, schedules and agreements of Nickel Plate and Wabash, as well as those having application on the Sandusky line, basically requires that job eliminations as a result of the unification be accomplished only through normal attrition. Under its terms, Norfolk & Western agrees to take into its employment, upon consummation of the merger, lease, and purchase, all employees of the lines involved with the guarantee that they will not be adversely affected in their employment as a result of the proposed transactions or for any reason other than furloughs due to seasonal requirements or a decline in volume of traffic or revenue.

* * * * *

It was stipulated that under any report and order approving the proposed merger, lease, and purchase it may be considered that these agreements were made pursuant to and in conformity with section 5(2)(f) of the act for the protection of the covered employees. Joint Exhibit 6 pp. 89-90.

The principal agreement between the N&W and the unions was signed on April 16, 1962 and was effective according to its terms on January 10, 1962, but did not actually go into effect until the merger was consummated. The agreement provides that the employees shall be entitled to the protection afforded by the Washington Job Protection Agreement and provided additional special arrangements for employees the various carriers involved. Section 3 of this agreement provides:

> On the effective date of the acquisition by Norfolk & Western of the Sandusky Line presently operated by the Pennsylvania Railroad, approval for which is sought in Finance Docket No. 21512, Norfolk & Western will take into its employment all employees represented by the labor organizations signatory hereto, except those on furlough or leave of absence as of the effective date of this Agreement or subsequent thereto up to and including the date the merger is consummated, who during such period have exercised employment rights on said Sandusky Line and elect to accept such employment; provided, however, that in the event two or more employees, including those on leave of absence, have employment rights to the same job, said employees will be protected hereunder and their employment preserved only to the extent of their individual equities in said job; and provided further, however, that none of such employees shall be deprived of employment or placed in a worse position with respect to compensation at any time during such employment except that Norfolk & Western shall not be required to provide employment to any such employee during any year, commencing on the effective date of said acquisition, of greater duration than such employee enjoyed on said line in the twelve months' period immediately preceding the effective date of said acquisition. In the event any such employee elects not to accept such employment and in lieu thereof exercises employment rights on the Pennsylvania Railroad, Norfolk & Western agrees to offer em-

ployment to the employee of the Pennsylvania Railroad ultimately displaced by the return of said employee, who elects to accept such employment. Pennsylvania Railroad employees accepting such employment shall be entitled to all the protective benefits of this Section provided that Norfolk & Western shall not be required to provide employment or compensation to any such employee during any year, commencing on the effective date of such acquisition, of greater duration or amount than was performed by and paid to the Sandusky Line employee, who caused such Pennsylvania Railroad employee to be displaced, in the twelve months' period immediately preceding the effective date of said acquisition.

Employees protected under this Section shall not be regarded as deprived of employment or placed in a worse position with respect to compensation in case of their resignation, death, retirement, dismissal for cause in accordance with existing agreements, failure to work due to disability or discipline in accordance with existing rules or agreements or furlough because of reduction in forces due to seasonal requirements as aforesaid or decline in volume of traffic or revenues.

The method of determining the protective benefits was set forth in Joint Exhibit 4 which was dated January 10, 1962 and basically provided for determination of the average monthly compensation of the employee for the last 12 months before the merger in which he performed service and supplementing monthly earnings each month to reach that amount. This agreement likewise was drawn to cover all of the employees of all of the carriers affected by the merger.

The dispute before this Court is basically that the plaintiffs claim that they have not received all of the protective benefits to which they are entitled. The N&W has disputed this and has questioned the jurisdiction of this Court to hear this controversy. The Court has previously ruled that this matter does not have to be submitted to

arbitration under the Railroad Labor Act or under the ICC order and will adhere to that ruling insofar as it pertains to the basic dispute. There are, in addition, several other jurisdictional questions which the Court has not had the benefit of extensive briefing by counsel on, but which the Court will undertake to resolve as it reaches that portion of its analysis of the dispute.

Basically, the N&W claims that it has an agreement executed pursuant to the last sentence of 49 U.S.C. § 5(2)(f) providing for the determination of protective benefits on the basis of plaintiffs' Sandusky Line earnings alone. Plaintiffs, the employees represented by the Brotherhood of Railroad Trainmen, claim that they are entitled to payments based upon their earnings for the entire Toledo Division prior to the merger.

The question of whether 49 U.S.C. § 5(2)(f) prescribes a minimum level of compensation appears to be one of first impression in the courts. The Supreme Court in *Railway Labor Executives Ass'n v. United States*, 339 U.S. 142 (1950) determined that the four year provision in the second sentence of 49 U.S.C. § 5(2)(f) prescribed the minimum duration of the protective benefits afforded by the carriers and the I.C.C. The Supreme Court was called upon to determine whether 49 U.S.C. § 5(2)(f) required a "job freeze" for a four year period following a merger. *Brotherhood of Maintenance of Way Employees v. United States*, 366 U.S. 169 (1961). The Court there determined that the Congress did not intend a "job freeze," but that the compensation alone was required. In reaching this conclusion the Court reviewed the legislative history of the act and the interpretations given to the act by those most affected at the time of the passage of the bill. The result appears in the opinion as footnotes 7 and 8. *Ibid.* at 176-77. This clearly shows that Conference Committee Chairman Lea and the Brotherhood of Maintenance of Way Employees believed that the provision guaranteed the affected employees income for four years after the merger whether they were employed or not.

The I.C.C. promulgated certain conditions known as

the Oklahoma Conditions which form the basis of all I.C.C. protective orders since the passage of 49 U.S.C. § 5(2)(f).[3] After being partly reversed in the imposition of these conditions by the Supreme Court in *Railway Labor Ass'n v. United States*, 339 U.S. 142 (1950), the I.C.C. amended the Oklahoma Conditions by the addition of the Washington Job Protection Agreement with the Oklahoma Conditions as a minimum. *New Orleans Passenger Terminal Cases*, 282 I.C.C. 271 (1952).[4] The resulting conditions became known as the New Orleans Conditions. It was these conditions which were involved in *Brotherhood of Maintenance of Way Employees v. United States*, 366 U.S. 169 (1961). There the Court described the conditions as follows:

> Briefly, the New Orleans conditions prescribe the following: employees retained on the job but in a lower paying position get the difference between the two salaries for four years following the merger; dis-

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[3] *Oklahoma Ry. Co.—Trustees Abandonment*, 257 I.C.C. 177 (1964). These conditions provide in part:

§ 4. If, as a result of the abandonment of operation herein permitted, * * *, any employee, * * *, is displaced, that is, placed in a worse position with respect to his compensation and rules governing his work conditions, and so long thereafter as he is unable, in the exercise of his seniority rights under existing agreements, rules, and practice, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the monthly compensation received by him in the position from which he was displaced. 257 I.C.C. at 197.

There is also a provision for wage guarantee if he leaves employment providing that the guarantee (which itself is a rough rule of thumb on how much will be lost by taking new employment) shall be paid only to bring the wages up to the point they were at at the time of the merger.

[4] "The Oklahoma conditions differ [from the Washington Job Protection agreement] in that they prescribe 100% protection [of wages] for a maximum period of 4 years from the effective date of the Commission's order." *New Orleans Passenger Terminal Cases*, 282 I.C.C. 271 (1952).

> charged employees get their old salaries for four years, less whatever they make in other jobs, or they may elect a lump sum payment; transferred employees get certain moving expenses, and certain fringe benefits are insured; and any additional benefits that a given employee would have received under the Washington Job Protection Agreement, * * * are guaranteed. *Brotherhood of Maintenance of Way Employees v. United States,* 366 U.S. 169, 171 n. 1 (1961).

When all of these factors are taken together, particularly in light of the fact that the Oklahoma Conditions were promulgated at a time when the I.C.C. believed that the four year provision of 49 U.S.C. § 5(2)(f) was considered to prescribe the maximum protective benefits allowable, this Court is compelled to the conclusion that 49 U.S.C. § 5(2)(f) requires a wage freeze for four years after the consummation of the merger as the minimum protective benefits.

It now becomes necessary for this Court to determine whether this wage freeze applies only to those wages earned on the Sandusky Line or pertains to the entire earnings of the plaintiffs throughout the Toledo Division of the Pennsy. Again, no court has reported a case involving protective benefits arising from the sale of a portion of a railroad which split a seniority district. As far as the plaintiffs are concerned, the sale of the Sandusky Line by the Pennsy to the N & W is the same as if the Pennsy had been merged into the N & W and all of the Pennsy Toledo Division lines except the Sandusky Line had been abandoned. There could be no dispute that the plaintiffs' protective benefits would be calculated on the basis of their entire earnings in the Toledo Division, not just on that portion of the Division which had not been abandoned, namely, the Sandusky Line. Plaintiffs in the case before the Court are precluded from working throughout the Toledo Division just as surely as they would be in the hypothetical case. To draw a distinction between

the instant case and the hypothetical would be to do violence to the intent of Congress in enacting this statute and to place the form of the transaction over the substance of the merger. The Court holds that 49 U.S.C. § 5(2)(f) requires that the N & W calculate plaintiffs' protective benefits on the basis of plaintiffs' earnings for the entire Toledo Division.

Attention must now be turned to whether defendants' position that protective benefits are to be calculated on the basis of Sandusky Line earnings alone is frozen into the I.C.C. order, which would divest this Court of jurisdiction.[5] The Court has heretofore set forth the language of the I.C.C.'s order and the language of the agreement between the union and the carriers which the I.C.C. incorporated as part of its order. The I.C.C. interpreted the agreement between the unions and the N & W to say that "* * * Norfolk & Western agrees to take into its employment upon consummation of the merger, lease, and purchase. all employees of the lines involved with the guarantee that they will not be adversely affected in their employment as a result of the proposed transactions or for any reason other than furloughs due to seasonal requirements or a decline in volume of traffic or revenue." Joint Exhibit 6, p. 89. The I.C.C. is referring to the language in Joint Exhibit 1 which states "* * *, that none of such employees shall be deprived of employment or placed in a worse position with respect to compensation at any time during such employment except that Norfolk & Western shall not be required to provide employment to any such employee during any year, commencing on the effective date of said acquisition, of greater duration than such employee enjoyed on said line in the twelve months' period immediately preceding the effective date of said acquisition * * *."

"Employees protected under this Section shall not be regarded as deprived of employment or placed in a worse

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[5] Cases to review an I.C.C. order pursuant to 28 U.S.C. § 1336 must be brought by or against the United States, 28 U.S.C. § 2322, and must be filed within 90 days after the date the Commission order becomes final, 28 U.S.C. § 1336(c).

position with respect to compensation in case of * * * furlough because of reduction in forces due to seasonal requirements as aforesaid or decline in volume of traffic or revenues." Joint Exhibit 1, pp. 9-10.

It appears from this that the I.C.C. order contemplated that plaintiffs' total wage could be reduced because of seasonal furlough or decline in revenue, but not because of the merger. Whether this complies with the Court's interpretation of 49 U.S.C. § 5(2)(f) is a question which this Court is without jurisdiction to consider since the action was not timely commenced, 28 U.S.C. § 1336(c), and because it was not properly brought, 28 U.S.C. § 2321 *et seq.* This Court must thus accept the I.C.C. provisions as being correct.

The loss of compensation due to the inability of the plaintiffs to perform work throughout the Toledo Division is not proximately caused by the seasonal requirements of defendant or a decline in volume of traffic or revenue. Rather it is the result of the merger narrowing the seniority district to the Sandusky Line alone. Plaintiffs are thus entitled to damages pursuant to 49 U.S.C. § 9 to the extent that their compensation has been diminished by the inability to perform work throughout the Toledo Division. They are not entitled to damages however for the extent that their compensation has been diminished by furlough due to seasonal requirements or because of any decline in volume of traffic or revenue which may have occurred.

The jurisdiction of this Court to entertain such a suit lies under 28 U.S.C. §§ 1331, 1336, 1337, 2321, and 49 U.S.C. § 9.

This Court is not unaware that the language of Joint Exhibit 1 says that employees shall not be placed in a worse position with respect to their employment except due to furloughs on account of seasonal requirements or decline in traffic or revenue, and that the language of Joint Exhibit 1 (p. 9) clearly differentiates between employment and compensation in another paragraph of the same section. The Court, however, will construe this in

the light which provides the least coverage, noting that the language of 49 U.S.C. § 5(2)(f) only speaks of employment but the term as therein used has been used to cover both employment and compensation. While this construction results in an inconsistency in the use of terms within Joint Exhibit 1, it is not the Court's intention that this construction be considered the determination of the actual intent of the parties.

The function of the Court in this case is not to construe totally and definitively the agreement between the defendant and the union which was adopted by the I.C.C. as its protective order; rather the Court's function is to delineate the minimal requirements of the law and the I.C.C. order in a situation where defendant's course of conduct with respect to the protective benefits guaranteed plaintiffs has not been in compliance with the law or the I.C.C. order. But the function of the Court is not to go beyond requirements of the law and the reasons why it finds non-compliance with the law. The interpretation of the agreement between the carrier and the union and of the I.C.C. order as to meaning consistent with law, is a matter which is to be left to arbitration according to the I.C.C. order as provided in Joint Exhibit 1 (pp. 7-8). *Arnold v. L. & N. R.R.*, 180 F. Supp. 429 (M.D. Tenn. 1960), *aff'd sub nom., Batts v. L. & N. R.R.*, 316 F.2d 22 (6th Cir. 1963).

Defendant will contend that Joint Exhibit 10 represents an agreement entered into pursuant to the last sentence of 49 U.S.C. § 5(2)(f) which reads:

> * * * Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Assuming that this does constitute an agreement, and assuming that it provides for protective benefits to be cal-

culated as the N & W claims that they are to be calculated, the Court is faced squarely with the question of whether such an agreement is to be enforced.

Numerous other courts have had opportunities to address themselves to this question: e.g., *O'Mara v. Erie Lackawanna R.R.*, 407 F.2d 647 (2nd Cir. 1969); *Flaherty v. Kansas, Oklahoma and Gulf R.R.*, 252 F. Supp. 736 (E.D. Okla. 1966); *Roberts v. Lehigh & New England R.R.*, 323 F.2d 219 (3rd Cir. 1963). The courts in these cases simply assumed that the agreement was in compliance with the statute and proceeded to consider whether this provision of the statute permitted the carrier and the union to change the I.C.C. order. In all of these cases it was held that it did. The ability to entirely rewrite the protective agreement does not necessarily imply the ability to lessen the Congressionally established minimum protection.

The court in *Arnold v. Louisville & Nashville R.R.*, 180 F. Supp. 429 (M.D. Tenn. 1960), *aff'd sub nom., Batts v. Louisville & Nashville R.R.*, 316 F.2d 22 (6th Cir. 1963), interpreted the provision of the statute in question as follows:

> Thus, while the statute requires the Commission to make provisions for the protection of employees adversely affected, it specifically reserves to the railroad employees the right, through their duly authorized representatives, to enter into an agreement with the railroad as to terms, conditions and arrangements for their own protection. Under this provision of the statute, as the Court construes its meaning and effect, the employees may, through a collective bargaining agreement with the railroad, make provisions for their own protection by *adopting, supplementing* or *implementing* the provisions made by the Commission for their protection. 180 F. Supp. at 433-34 (Emphasis added.)

This interpretation of the statute was adopted by the District Court in *Clemens v. Central R.R. of New Jersey*, 264

F. Supp. 551 (E.D. Pa. 1967), *rev'ed on other grounds*, 399 F.2d 825 (3rd Cir. 1968). This Court accepts this interpretation, that is that the agreement can alter, supplement, or vary the I.C.C. order so long as it does not abridge the protection afforded by the statute or the I.C.C. order.[6]

The language of the statute supports this interpretation. The first clause of the sentence reads "Notwithstanding any other provisions of this chapter * * *." This would seem to mean notwithstanding any provision of this chapter other than § 5(2)(f). As such it would seem to guarantee to the unions the rights to make agreements respecting protective benefits which might otherwise be construed to be solely a power of the I.C.C. Unfortunately the legislative history does not appear to shed any light on this question.

Finally, it must be realized that the economic policy underlying 49 U.S.C. § 5(2)(f) is very strong. A study of the history of this legislation in the House of Representatives reveals that adequate economic protection for those displaced in mergers was one of the main concerns of Congress in passing this legislation. To permit this policy to be undermined by agreements between the carriers and the unions would do violence to the Congressional scheme. The Court will hold that if the union and the N & W did reach the agreement which is embodied in Joint Exhibit 10, that agreement is unenforceable and void as against manifest public policy.

There has been talk of there being an accord and satisfaction which disposed of this case. The N & W has urged that there was an oral settlement of the claims coupled with Joint Exhibit 10 and several letters. This was reached by the N & W in negotiation with plaintiffs'

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[6] The Court realizes that an agreement may in changing the protective benefits lessen the protection as to certain classes of employees, without really altering the total level of protection. The courts should view such diminution of protective benefits with disfavor and such should only be permitted to stand if, when viewed in light of the entire scheme of protection as modified by the agreement in question, the diminution is benign.

union. What has been said with regard to Joint Exhibit 10 alone applies equally to any such agreement. Thus only an accord reached with each individual plaintiff may survive under the law. Defendant does not contend that there ever were such accords. This obviates the necessity of passing on whether any such agreement is in compliance with the statute of frauds or whether the statute of frauds applies.

Finally we come to the question of damages. This case could have been tried as a case for declaratory judgment pursuant to 28 U.S.C. § 2201. Even where declaratory relief is not requested the courts may grant such relief where the pleading and proof show such to be appropriate. *Katzenbach v. McClung,* 379 U.S. 294 (1964); *Hunkin-Conkey Const. Co. v. Pennsylvania Turnpike Commission,* 34 F. Supp. 26 (M.D. Penn. 1940). Once the Court has determined that the defendant's position is not in accord with the law or the I.C.C. order and that Joint Exhibit 10 is unenforceable, the case appears to be one of a grievance arising under the I.C.C. order and thus susceptible to the arbitration clause contained therein. *Arnold v. Louisville & Nashville R.R.,* 180 F. Supp. 429 (M.D. Tenn. 1960), *aff'd sub nom., Batts v. Louisville & Nashville R.R.,* 316 F.2d 22 (6th Cir. 1963). As such the Court will defer the exercise of its jurisdiction to the arbitration process. The question of whether the loss of wages of each individual plaintiff resulted from the loss of the ability to work throughout the Toledo Division or from furlough due to seasonal requirements or loss of volume of traffic or of revenue, is a question which is particularly amenable to arbitration. Therefore the Court will order that the parties arbitrate this question in compliance with the I.C.C. order.

The disposition of this portion of the case does not necessarily dispose of the third party complaint by the N & W against the Brotherhood of Railroad Trainmen. The parties should inform the Court before the 15th of January whether they desire to proceed with that portion of the cause.

Plaintiffs shall prepare an order in compliance with Rule 4(a) of the Rules of the United States District Court for the Northern District of Ohio.

/s/ DON J. YOUNG,
United States District Judge.

Toledo, Ohio.

FINAL JUDGMENT.

(Filed January 8, 1970.)

This cause came on to be heard upon defendant's motion for a summary judgment, plaintiffs' motion for a summary judgment, the stipulation of the parties, depositions, affidavits, and exhibits in support of said motions, and the briefs of counsel, and the Court, on consideration thereof, and for the reasons stated in its opinion heretofore filed, which constitutes its findings of fact and conclusions of law, finds that declaratory relief is appropriate in the premises; it is therefore

ORDERED that a declaratory judgment and order be rendered in favor of plaintiffs and against defendant, requiring that the parties submit to arbitration the question of the amount of damages to which the plaintiffs and each of them are entitled against the defendant, as required by the protective order of the Interstate Commerce Commission; and it is

FURTHER ORDERED that if the parties desire to proceed with the defendant's third party complaint against the Brotherhood of Railroad Trainmen, they shall so advise the Court prior to January 15th, 1970, but any proceedings on such third party complaint shall be deferred until the completion of the arbitration ordered herein.

THE COURT FURTHER FINDS that there is no just reason for delay and that the judgment herein entered shall constitute a final appealable order as to plaintiffs and defendant.

/s/ DON J. YOUNG,
United States District Judge.

Toledo, Ohio.

NOTICE OF APPEAL.

(Filed February 5, 1970.)

Notice is hereby given that the Norfolk and Western Railway Co., Defendant above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the final judgment entered in this action on the 8th day of January, 1970 in favor of Plaintiffs and against Defendant, the Court having found no just reason for delay.

/s/ JOHN M. CURPHEY,
/s/ ROBISON, CURPHEY & O'CONNELL,
Attorneys for Defendant.

ORDER EXTENDING TIME FOR FILING RECORD AND DOCKETING APPEAL.

(Filed March 16, 1970.)

Upon request of the Clerk of this Court; good cause therefore appearing

IT IS ORDERED that the time for the filing of the record on appeal in the United States Court of Appeals for the Sixth Circuit, and for the docketing therein is extended to March 30, 1970, pursuant to Rule 73 (g) of the Federal Rules of Civil Procedure, and Rule 11 (d) of United States Court of Appeals for the Sixth Circuit.

/s/ DON J. YOUNG,
United States District Judge.

Toledo, Ohio.

JOINT EXHIBIT 1.

Agreement for Protection of Employees, Effective January 10, 1962.

AGREEMENT FOR PROTECTION OF EMPLOYEES IN EVENT OF APPROVAL OF MERGER AND RELATED APPLICATIONS FILED BY NORFOLK AND WESTERN RAILWAY COMPANY AND OTHER CARRIERS IN I.C.C. FINANCE DOCKET NOS. 21510, 21511, 21512, 21513, AND 21514.

I. WHEREAS, a joint application has been filed with the Interstate Commerce Commission (herein called the Commission) in Finance Docket No. 21510 by the Norfolk and Western Railway Company (herein called Norfolk & Western) and the New York, Chicago and St. Louis Railroad Company (herein called Nickel Plate) under Section 5(2) of the Interstate Commerce Act (herein called the Act) for authority to merge the properties and franchises of Nickel Plate into Norfolk & Western, and for certain other authority incident thereto by way of acquisition of control of carriers subsidiary to or affiliated with Nickel Plate and to acquire certain trackage rights;

II. AND WHEREAS, Norfolk & Western has further filed an application with the Commission in Finance Docket No. 21511 under Section 5(2) of the Act for authority (a) to lease the lines of railroad and certain of the franchises and other properties of the Wabash Railroad Company (herein called Wabash); (b) to acquire control of Wabash through stock ownership; (c) to acquire sole or joint control of certain carriers subsidiary to or affiliated with Wabash through lease or stock ownership; and (d) to acquire trackage rights over or joint use of the railroad lines of certain carriers now held by Wabash;

III. AND WHEREAS, Norfolk & Western has further filed an application with the Commission in Finance Docket No. 21512 under Section 5(2) of the Act for authority (a) to purchase from The Connecting Railway Company (now operated by The Pennsylvania Railroad Company) its line of railroad between Columbus, Ohio

and Sandusky, Ohio, together with certain trackage in Columbus; and (b) to acquire trackage rights over certain lines of The Connecting Railway Company in Columbus, Ohio;

IV. AND WHEREAS, other applications have been filed by Norfolk & Western with the Commission under Section 20a of the Act for authority to issue capital stock and assume certain obligations and liabilities of both Nickel Plate and Wabash, all of which is more fully described in Finance Docket Nos. 21513 and 21514;

V. AND WHEREAS, certain other applications may be later filed with the Commission under Section 5(2) of the Act involving the lease, control by or merger into Norfolk & Western of The Akron, Canton & Youngstown Railroad Company and Pittsburgh & West Virginia Railway or transactions may be undertaken by the carriers heretofore named including Nickel Plate and Wabash involving the diversion of Wabash traffic from the Canadian National Railways to Nickel Plate, or the diversion of Nickel Plate passenger operations from the LaSalle Street Station (Rock Island Lines) in Chicago, Illinois, to the Chicago and Western Indiana Railroad (Dearborn Street Station), Chicago, Illinois, which applications or transactions may have adverse effects upon employees represented by the labor organizations parties hereto, the extent of which is not now determinable;

VI. AND WHEREAS, the international and national railway labor organizations signatory hereto are the authorized and recognized representatives of employees of Norfolk & Western, Nickel Plate, Wabash and other carriers involved in the said transactions, and have intervened (through the Railway Labor Executives' Association) in the above-described proceedings before the Commission on behalf of the said employees in opposition to the said merger and related transactions, which opposition is not waived by this Agreement;

VII. AND WHEREAS, Section 5(2)(f) of the Act (49 U.S.C.A. § 5(2)(f)) provides:

"As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

VIII. AND WHEREAS, pursuant to the provisions of the Railway Labor Act, as amended, and in accordance with the last sentence of Section 5(2)(f) of the Interstate Commerce Act above quoted, the parties signatory hereto have reached agreement respecting the protection to be afforded employees of the rail carriers involved in the aforesaid application and transactions.

NOW, THEREFORE, it is mutually agreed as follows:

Section 1.

(a) In the event the Commission should, notwithstanding the opposition of the said labor organizations to these transactions, approve any or all of the aforesaid applications, then, upon consummation thereof, the provisions of the Washington Job Protection Agreement of 1936

(a copy of which is attached hereto) will be applied for the protection of all employees of Norfolk & Western, Nickel Plate, Wabash and (except as hereafter modified in Section 3) all other carriers involved in each of the transactions designated or described in this Agreement, provided the applications or transactions mentioned therein are consummated, who may be adversely affected with respect to their compensation, rules, working conditions, fringe benefits or rights or privileges pertaining thereto, incident to approval and effectuation of any of said applications or transactions; provided, however, that in addition to the benefits set forth in the said Washington Job Protection Agreement, it is further agreed as follows:

(b) On the date the aforedescribed merger of Nickel Plate into Norfolk & Western is consummated, Norfolk & Western will take into its employment all employees of Nickel Plate as of the effective date of this Agreement or subsequent thereto up to and including the date the merger is consummated who are willing to accept such employment, and none of the present employees of either of the said carriers shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits, or rights and privileges pertaining thereto, at any time during such employment. For purposes of this Agreement the term "present employees" is defined to mean all employees except those on furlough or leave of absence as of the effective date of this Agreement or subsequent thereto up to and including the date the merger is consummated; provided, however, in the event two or more employees, including those on leave of absence, have employment rights to the same job, said employees will be protected hereunder and their employment preserved only to the extent of their individual equities in said job; provided, further, that the carrier shall also take over, assume and continue the employment relationship of all employees on furlough or leave of absence and preserve their rights and equities as they may exist as of the effective date of this Agreement or subsequent thereto up to and including the date the merger is con-

summated subject, however, to the transfer of work and employees as hereinafter set forth. Norfolk & Western agrees to furnish rosters (which shall be attached as Appendix B to this Agreement) of all employees entitled to preservation of employment, compensation, and fringe benefits as of the effective date of this Agreement, together with their current rates of pay, compensation paid, and hours worked during the preceding twelve months, and also separate rosters (which shall be attached hereto as Appendix C) of all employees on furlough or leave of absence, each of which rosters shall also set forth the carrier by which the employees are employed and the labor organization party to this Agreement representing such employees. Norfolk & Western further agrees that the said rosters are subject to revision as necessary to include any employees to be added or deleted from the said rosters between the effective date of this Agreement and the date the merger is consummated. An employee shall not be regarded as deprived of employment or placed in a worse position with respect to his compensation in case of his resignation, death, retirement, dismissal for cause in accordance with existing agreements, failure to work due to disability or discipline in accordance with existing rules or agreements or furloughs because of reduction in forces due to seasonal requirements or decline in volume of traffic or revenues. Where employees are furloughed for seasonal requirements they shall not be furloughed in any twelve-month period for a greater period than they were furloughed during the twelve months preceding the date the merger is consummated.

In consideration of the foregoing employee benefits, Norfolk & Western and the other carriers heretofore named shall be entitled to transfer the work of the employees protected hereunder throughout the merged or consolidated system and the labor organizations will enter into implementing agreements providing for the transfer of employees to follow their work, and the employees, their organizations and the carriers will cooperate to that end. The implementing agreements to be negotiated with

respect to the transfer of employees shall enable the Norfolk & Western to transfer such employees without liability to furloughed employees who may be affected by such transfer. It is further agreed that implementing agreements will be negotiated to permit the assignment of employees who do not follow their work to other jobs within their craft or class in the same general locality as their point of employment on the date affected whether or not such jobs are within the same seniority district, without liability to furloughed employees who may be affected thereby. Where necessary, employees who do not follow their work will be retrained at carrier expense for other jobs within their craft or class and given a reasonable period in which to qualify therefor. In the event an employee after retraining does not qualify for any such job, he may be assigned to other work in his craft or class for which he is qualified.

(c) Norfolk & Western will take over and assume all contracts, schedules and agreements between Nickel Plate and the labor organizations signatory hereto concerning rates of pay, rules, working conditions and fringe benefits in effect at the time of consummation of the said merger, and will be bound by the terms and provisions thereof, subject to changes in accordance with the provisions of the Railway Labor Act, as amended, in the same manner and to the same extent as if Norfolk & Western had been a party thereto.

(d) For purposes of this Agreement, Section 13 of the Washington Job Protection Agreement is deleted and the following provision inserted in lieu thereof:

In the event any dispute or controversy arises between Norfolk & Western and any labor organization signatory to this Agreement with respect to the interpretation or application of any provision of this Agreement or of the Washington Job Protection Agreement (except as defined in Section 11 thereof) or of any implementing agreement entered into between Norfolk & Western and individual organizations which are parties hereto pertaining to the

said merger or related transactions, which cannot be settled by Norfolk & Western and the labor organization or organizations involved within thirty days after the dispute arises, such dispute may be referred by either party to an arbitration committee for consideration and determination. Upon notice in writing served by one party on the other of intent by that party to refer the dispute or controversy to an arbitration committee, each party shall, within ten days, select one member of the arbitration committee and the two members thus chosen shall endeavor to select a third member who shall serve as chairman, in which event the compensation and expenses of the chairman shall be borne equally by the parties to the proceeding. All other expenses shall be borne by the party incurring them. Should the two members be unable to agree upon the appointment of the third member within ten days, either party may request the National Mediation Board to appoint the third member, whose compensation and expenses shall then be paid in accordance with existing law. The decision of the majority of the arbitration committee shall be final and binding.

Section 2.

It is further agreed that all of the provisions set forth in Section 1(a) of this Agreement respecting protection to be afforded employees in the event of merger of Nickel Plate into Norfolk & Western shall except as provided in Section 3 hereof apply and be afforded by Norfolk & Western to employees involved in each of the related transactions heretofore designated or described in this Agreement and, in addition, except as provided in Section 3 hereof the provisions of Section 1(b), (c) and (d) shall apply and be afforded by Norfolk & Western to employees of Wabash, The Akron, Canton & Youngstown Railroad Company and Pittsburgh and West Virginia Railway in the event said line or lines are leased to, controlled by or merged into Norfolk & Western with equal force and effect as if they had been repeated herein with specific reference to each such transaction.

Section 3.

On the effective date of the acquisition by Norfolk & Western of the Sandusky Line presently operated by the Pennsylvania Railroad, approval for which is sought in Finance Docket No. 21512, Norfolk & Western will take into its employment all employees represented by the labor organizations signatory hereto, except those on furlough or leave of absence as of the effective date of this Agreement or subsequent thereto up to and including the date the merger is consummated, who during such period have exercised employment rights on said Sandusky Line and elect to accept such employment; provided, however, that in the event two or more employees, including those on leave of absence, have employment rights to the same job, said employees will be protected hereunder and their employment preserved only to the extent of their individual equities in said job; and provided further, however, that none of such employees shall be deprived of employment or placed in a worse position with respect to compensation at any time during such employment except that Norfolk & Western shall not be required to provide employment to any such employee during any year, commencing on the effective date of said acquisition, of greater duration than such employee enjoyed on said line in the twelve months' period immediately preceding the effective date of said acquisition. In the event any such employee elects not to accept such employment and in lieu thereof exercises employment rights on the Pennsylvania Railroad, Norfolk & Western agrees to offer employment to the employee of the Pennsylvania Railroad ultimately displaced by the return of said employee, who elects to accept such employment. Pennsylvania Railroad employees accepting such employment shall be entitled to all the protective benefits of this Section provided that Norfolk & Western shall not be required to provide employment or compensation to any such employee during any year, commencing on the effective date of such acquisition, of greater duration or amount than was performed

by and paid to the Sandusky Line employee, who caused such Pennsylvania Railroad employee to be displaced, in the twelve months' period immediately preceding the effective date of said acquisition.

Employees protected under this Section shall not be regarded as deprived of employment or placed in a worse position with respect to compensation in case of their resignation, death, retirement, dismissal for cause in accordance with existing agreements, failure to work due to disability or discipline in accordance with existing rules or agreements or furlough because of reduction in forces due to seasonal requirements as aforesaid or decline in volume of traffic or revenues.

On the effective date of said acquisition, Norfolk & Western will take over and assume all contracts, schedules and agreements having application on said Sandusky Line between Pennsylvania Railroad and the labor organizations signatory hereto concerning rates of pay, rules and working conditions, other than provisions therein (1) granting employees employed on said Line seniority or employment rights beyond said Line and (2) granting seniority or employment rights on said Line to employees having employment rights beyond said Line, in effect at the time of acquisition of said Sandusky Line and will be bound by the terms and provisions thereof subject to changes in accordance with the provisions of the Railway Labor Act, as amended, in the same manner and to the same extent as if Norfolk & Western had been a party thereto.

In the event the Commission approves the acquisition by the Norfolk & Western of trackage rights of 2.9 miles over certain lines of The Connecting Railway Company, now operated by The Pennsylvania Railroad Company, authority for which is sought as a part of Finance Docket No. 21512, then, upon consummation thereof, the provisions of the Washington Job Protection Agreement of 1936 will be applied for the protection of all employees of The Pennsylvania Railroad Company represented by the labor organizations parties hereto who may be adversely af-

fected as a result of such acquisition of trackage rights by Norfolk & Western with respect to their rates of pay, rules or working conditions or rights or privileges pertaining thereto.

It is further agreed that Section 1(d) herein shall be applicable to the provisions contained in this Section.

Section 4.

The foregoing represents an agreed settlement of protection of the interests of the employees of the carriers involved in the aforedescribed transactions as represented by their authorized and recognized bargaining representatives signatory hereto, pursuant to Section 5(2)(f) of the Interstate Commerce Act and applicable provisions of the Railway Labor Act, as amended, which shall become applicable only in the event of approval by the Commission and consummation of any or all of the above-designated applications now pending before it. It shall be considered and construed as a separate agreement between Norfolk & Western and each of the labor organizations signatory hereto.

Section 5.

It is understood and agreed that the provisions of this Agreement shall be for the benefit only of employees represented by the labor organizations parties hereto.

Section 6.

The effective date of this Agreement shall be January 10, 1962.

IN WITNESS WHEREOF, the parties to this Agreement have hereunto executed the same by and through their duly authorized representatives this 16th day of April 1962.

Norfolk & Western Railway Company
By /s/ Stuart T. Saunders
President

American Railway Supervisors Association
By /s/ J. P. Tahney

American Train Dispatchers' Association
By /s/ R. C. Coutts

Brotherhood of Maintenance of Way Employes
By /s/ H. C. Crotty

Brotherhood of Railroad Signalmen
By /s/ Jesse Clark

Brotherhood Railway Carmen of America
By /s/ A. J. Bernhardt

Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employes
By /s/ Geo. M. Harrison

Brotherhood of Sleeping Car Porters
By /s/ A. Philip Randolph

Hotel & Restaurant Employees & Bartenders International Union
By /s/ Richard W. Smith

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers
By /s/ Russel K. Berg

International Brotherhood of Electrical Workers
By /s/ Thos. Ramsey

International Brotherhood of Firemen & Oilers
By /s/ A. E. Matz

Railroad Yardmasters of America
By /s/ M. G. Schoch

Sheet Metal Workers' International Association
By /s/ J. W. O'Brien

The Order of Railroad Telegraphers
By /s/ G. E. Leighty

Brotherhood of Locomotive Engineers
By /s/ R. E. Davidson

Brotherhood of Locomotive Firemen & Enginemen
By /s/ H. E. Gilbert

Order of Railway Conductors & Brakemen
By /s/ Louis J. Wagner

Brotherhood of Railroad Trainmen
By /s/ W. P. Kennedy

International Association of Machinists
By /s/ J. W. Ramsey

Railway Employes' Department, AFL-CIO
By /s/ Michael Fox

JOINT EXHIBIT 2.

Memorandum of Understanding, Effective January 10, 1962.

In construing that certain Agreement for Protection of Employees in Event of Approval of Merger and Related Applications Filed by Norfolk and Western Railway Company and Other Carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513 and 21514 effective January 10, 1962, between Norfolk and Western Railway Company and certain national and international labor organizations signatory thereto, it is understood and agreed as follows:

1. Norfolk and Western agrees that it will give advance notice of not less than that required by rules agreement with the organization or organizations involved to, and endeavor to confer with, the bargaining representatives of the employees involved regarding furloughs which

it intends to make pursuant to the aforesaid Agreement effective January 10, 1962.

2. The protection afforded by the aforesaid Agreement effective January 10, 1962, includes all Nickel Plate employees, represented by the labor organizations signatory thereto and employed on the date of said Agreement, who may be adversely affected by the construction or operation by Nickel Plate jointly in connection with the Erie-Lackawanna Railroad Company of yard properties and facilities in East Buffalo, New York, or by other transactions requiring ICC approval not designated in said Agreement.

3. If, subsequent to the date the protective benefits of the aforesaid Agreement effective January 10, 1962, become effective, officials, supervisory or excepted personnel exercise seniority rights in a craft or class of employees protected by said Agreement, then, during the period such seniority is exercised, such officials, supervisory or excepted personnel shall be entitled to the same protection afforded by said Agreement to employees in the craft or class in which such seniority is exercised, and no employee subject to said Agreement shall be deprived of employment or adversely affected with respect to compensation, rules, working conditions, fringe benefits, or rights and privileges pertaining thereto, by the return of the official, supervisory or excepted employee to work under the rules agreement.

4. It is understood and agreed that the said Agreement does not diminish the rights and benefits of the employees subject to the Agreement of June 18, 1959, or implementing agreements made pursuant thereto in the Norfolk and Western—Virginian merger case except that said Agreement effective January 10, 1962, shall apply with respect to arbitration, retraining of employees and transfer of work.

5. In construing the last paragraph of Section 1(b) of said Agreement concerning the right of the Norfolk &

Western to transfer the work of the employees protected under said Agreement, it is clearly understood and agreed that the Norfolk & Western may not transfer any employee (as distinguished from work) to another job within his craft or class beyond the same general locality as his point of employment on the date affected without the consent of his representative and that the refusal of such representative to agree to the transfer of such employee without the employee's consent shall not be subject to arbitration as provided in Section 1(d) of this Agreement.

Dated and made effective January 10, 1962.

Norfolk & Western Railway Company
By /s/ Stuart T. Saunders
President

American Railway Supervisors Association
By /s/ J. P. Tahney

American Train Dispatchers' Association
By /s/ R. C. Coutts

Brotherhood of Maintenance of Way Employees
By /s/ H. C. Crotty

Brotherhood of Railroad Signalmen
By /s/ Jesse Clark

Brotherhood Railway Carmen of America
By /s/ A. J. Bernhardt

Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees
By /s/ Geo. M. Harrison

Brotherhood of Sleeping Car Porters
By /s/ A. Philip Randolph

Hotel & Restaurant Employees & Bartenders International Union
By /s/ Richard W. Smith

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers
By /s/ Russel K. Berg

International Brotherhood of Electrical Workers
By /s/ Thos. Ramsey

International Brotherhood of Firemen & Oilers
By /s/ A. E. Matz

Railroad Yardmasters of America
By /s/ M. G. Schoch

Sheet Metal Workers' International Association
By/s/ J. W. O'Brien

The Order of Railroad Telegraphers
By /s/ G. E. Leighty

Brotherhood of Locomotive Engineers
By /s/ R. E. Davidson

Brotherhood of Locomotive Firemen & Enginemen
By /s/ H. E. Gilbert

Order of Railway Conductors & Brakemen
By /s/ Louis J. Wagner

Brotherhood of Railroad Trainmen
By /s/ W. P. Kennedy

International Association of Machinists
By /s/ J. W. Ramsey

Railway Employes' Department, AFL-CIO
By /s/ Michael Fox

JOINT EXHIBIT 3.

Memorandum of Understanding, Effective January 10, 1962.

In construing that certain Agreement for protection of employees in event of approval of the merger and related transactions filed by Norfolk and Western Railway Company and other carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513 and 21514 effective January 10, 1962, between Norfolk and Western Railway Company and certain national and international labor organizations signatory thereto, it is understood and agreed as follows:

Said Agreement shall not be construed or used to prohibit or in any way limit the rights or obligations of the parties to modify or make changes in agreements affecting rates of pay, rules or working conditions to which the Norfolk and Western Railway Company or other carriers named therein are parties and which may be effectuated through concerted or national handling in the railroad industry.

Effective date January 10, 1962.

Norfolk & Western Railway Company
By /s/ Stuart T. Saunders
President

American Railway Supervisors Association
By /s/ J. P. Tahney

American Train Dispatchers' Association
By /s/ R. C. Coutts

Brotherhood of Maintenance of Way Employees
By /s/ H. C. Crotty

Brotherhood of Railroad Signalmen
By /s/ Jesse Clark

Brotherhood Railway Carmen of America
By /s/ A. J. Bernhardt

Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees
By /s/ Geo. M. Harrison

Brotherhood of Sleeping Car Porters
By /s/ A. Philip Randolph

Hotel & Restaurant Employees & Bartenders International Union
By /s/ Richard W. Smith

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers
By /s/ Russel K. Berg

International Brotherhood of Electrical Workers
By /s/ Thos. Ramsey

International Brotherhood of Firemen & Oilers
By /s/ A. E. Matz

Railroad Yardmasters of America
By /s/ M. G. Schoch

Sheet Metal Workers' International Association
By /s/ J. W. O'Brien

The Order of Railroad Telegraphers
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Order of Railway Conductors & Brakemen
By /s/ Louis J. Wagner

Brotherhood of Railroad Trainmen
By /s/ W. P. Kennedy

International Association of Machinists
By /s/ J. W. Ramsey

Railway Employes' Department, AFL-CIO
By /s/ Michael Fox

JOINT EXHIBIT 4.

Memorandum of Understanding, Effective January 10, 1962.

In construing that certain Agreement for Protection of Employes in Event of Approval of Merger and Related Applications Filed by Norfolk and Western Railway Company and other Carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513 and 21514 effective January 10, 1962, between Norfolk and Western Railway Company and certain national and international labor organizations signatory thereto, it is understood and agreed between the parties signatory hereto as follows:

When it is determined an employe subject to the terms and conditions of said Agreement has been adversely affected because of such merger, the adjustments hereinafter referred to as a "displacement allowance" due him, if any, will be determined by the following formula:

1. The "average monthly compensation" shall be arrived at by taking the total compensation received by the affected employe for the last 12 months in which he performed service, beginning with the month immediately preceding the month in which it has been determined he was adversely affected (such 12 months being hereafter referred to as the "test period"), and then dividing by 12. If the said affected employe's compensation is less in any month because of the merger than the aforesaid "average monthly compensation," he shall be paid the difference less compensation for any time lost on account of absences

to the extent he is not available for service under the applicable Schedule rules. If the employe at any time receives compensation in a month equal to or more than the "average monthly compensation," he shall not be entitled to any adjustment.

NOTE—(a) It was understood and agreed that in determining the "average monthly compensation" provided for in this Section, that in any month in which an employe involved was on bona fide furlough for the entire month but performed emergency service to which he did not stand to be called under the rules of the working agreement applicable to the craft or class in which he held seniority, that such month would not be used as one of the months in such "test period."

(b) It was further agreed that any compensation whatsoever (including vacation pay, arbitraries, pay for time lost, etc.) received from the Railway Company, but excluding payments made on account of personal injuries when such payments are for reasons other than time lost, would be used to reduce the amount of displacement allowances due any employe.

2. After the "average monthly compensation" has been arrived at as set forth in Section 1 hereof, it will always remain an affected employe's "average monthly compensation" except that the percentage of future general wage increases will be added to the said "average monthly compensation" beginning with the date in the month in which such wage increase becomes effective.

EXAMPLE: If it has been determined that an employe's "average monthly compensation" is $500, and a general wage increase of two percent becomes effective, such increase will be added and this will produce a new "average monthly compensation" of $510. The new "average monthly compensation" will be used in calculating the adjustment to be made to employes adversely affected because of such merger on and after the effective date of such increase.

3. When it is determined that an employe is entitled to a displacement allowance under the provisions of this Agreement, it will be made on a monthly basis and same shall be paid as soon as practicable.

4. Claims for employes who contend they are adversely affected by the merger will be made by the individual employe to the officer designated by the Company, with a copy to the Local Chairman of his Organization, within 30 days after the end of each month in which he claims to have been adversely affected, on the form attached hereto and marked Exhibit "A." If the employe's claim is denied by the Company and he desires to appeal the decision, he will submit his claim to said Local Chairman for appropriate handling.

5. This Memorandum of Understanding is applicable to the employes represented by the organizations signatory hereto and supersedes all existing agreements which may be in conflict herewith.

6. This Memorandum of Understanding shall become effective January 10, 1962.

FOR THE NORFOLK AND WESTERN RAILWAY COMPANY:

/s/ Stuart T. Saunders
President

FOR THE EMPLOYES:

/s/ R. E. Davidson
Brotherhood of Locomotive Engineers

/s/ H. E. Gilbert
Brotherhood of Locomotive Firemen & Enginemen

/s/ W. P. Kennedy
Brotherhood of Railroad Trainmen

/s/ Louis J. Wagner
Order of Railway Conductors & Brakemen

JOINT EXHIBIT 5.

Stipulation and Agreement.

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket
Nos. 21510, 21511, 21512, 21513, and 21514.

STIPULATION AND AGREEMENT

It is hereby stipulated and agreed by the parties hereto, by and through their respective attorneys signatory hereto, that, should the Interstate Commerce Commission approve the pending applications in Finance Docket Nos. 21510, 21511, 21512, 21513, and 21514, notwithstanding the opposition of the labor organizations signatory hereto, then in such event the provisions of the agreement (copy of which is attached hereto as Exhibit A) effective January 10, 1962, executed pursuant to the provisions of the Railway Labor Act, as amended, shall be applied for the protection of the interests of employees of the carriers involved in the above-entitled proceedings, as required by Section 5(2)(f) of the Interstate Commerce Act, and any report and order issued by the Commission in said proceedings approving the applications for merger and related transactions may so state.

Norfolk and Western Railway Company
By John P. Fishwick
Its Attorney

American Railway Supervisors Association
American Train Dispatchers' Association
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood Railway Carmen of America
Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employes
Brotherhood of Sleeping Car Porters
Hotel & Restaurant Employees & Bartenders International Union

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers
International Brotherhood of Electrical Workers
International Brotherhood of Firemen & Oilers
Railroad Yardmasters of America
Sheet Metal Workers' International Association
The Order of Railroad Telegraphers
Brotherhood of Locomotive Engineers
Brotherhood of Locomotive Firemen & Enginemen
Order of Railway Conductors & Brakemen
Brotherhood of Railroad Trainmen
International Association of Machinists

By William G. Mahoney
Their Attorney

JOINT EXHIBIT 7.

Memorandum of Understanding.

(October 9, 1964.)

Norfolk and Western Railway Company will take over and operate, effective at 12:01 A.M., October 16, 1964, the Sandusky Line which was acquired in Interstate Commerce Commission Finance Docket No. 21512.

To provide for an orderly transition of eligible Pennsylvania Railroad employes who have elected to accept employment with the Norfolk and Western Railway Company, the following procedure will be used:

1. A list of eligible Pennsylvania Railroad employes who have elected to accept employment with the Norfolk and Western under the provisions of Section 3 of the "Agreement for Protection of Employees in Event of Approval of Merger and Related Applications filed by Norfolk and Western Railway Company and Other Carriers in I. C. C. Finance Docket Nos. 21510, 21511, 21512, 21513, and 21514," dated January 10, 1962, will be estab-

lished. The names will appear on this list in the order of their seniority date on the Pennsylvania Railroad.

2. Supervisors of the Norfolk and Western will confer with interested Local Chairman and agree upon the number of men that will be needed to man the runs that will be established on the Norfolk and Western, as well as the number of men that will be initially needed to protect the extra lists that will be established at Columbus and Sandusky.

3. Employes who hold regular assignments immediately prior to the date of acquisition will remain on their runs as though the runs were under advertisement. On October 21, 1964, all runs on Sandusky District (including road and yard) will be bulletined. The advertisement bulletin will expire at 12:01 P.M., October 26, 1964, and assignments will be made prior to midnight same date.

4. After the assignments have been filled and the number of men agreed upon placed on the extra lists, additional men who are eligible and who have elected to accept employment with the Norfolk and Western will be called when needed to report for service with the Norfolk and Western in seniority order. Such men will have five days in which to report. Failure to report will result in forfeiture of their rights with the Norfolk and Western.

FOR THE NORFOLK AND WESTERN RAILWAY COMPANY

H. C. WYATT
Senior Vice President

FOR THE EMPLOYEES

J. F. MCNEEL
General Chairman, Brotherhood of Railroad Trainmen

J. J. COX
Brotherhood of Locomotive Engineers General Chairman

J. W. PRICE
General Chairman, Brotherhood of Locomotive Firemen and Enginemen

Oct. 9, 1964

JOINT EXHIBIT 8.

Implementing Agreement.

(October 27, 1964.)

WHEREAS, in Finance Docket No. 21512, the Interstate Commerce Commission, by report and order dated June 24, 1964, has approved and authorized the purchase by Norfolk and Western Railway Company of the Sandusky line of railroad and certain additional trackage of The Connecting Railway Company between Columbus and Sandusky, Ohio, and incidental to such purchase, the acquisition by Norfolk and Western Railway Company of trackage rights over a line of railroad of The Connecting Railway Company and trackage and joint use rights over the railroads of other carriers now held by The Connecting Railway Company and the Pennsylvania Railroad Company; and

WHEREAS, it is the desire of the parties signatory hereto to afford an orderly acquisition and operation of the Sandusky line by Norfolk and Western Railway Company effective 12:01 A. M., October 16, 1964:

NOW, THEREFORE, it is mutually agreed as follows:

1. Norfolk and Western Railway Company will take over and operate, effective at 12:01 A. M., October 16, 1964, the Sandusky line which was acquired in Interstate Commerce Commission Finance Docket No. 21512.

2. Norfolk and Western will take into its employment employees of the Pennsylvania Railroad who are eligible under the provisions of Section 3 of the "Agreement for Protection of Employees in Event of Approval of Merger And Related Applications Filed by Norfolk and Western Railway Company and Other Carriers in I. C. C. Finance Docket Nos. 21510, 21511, 21512, 21513, and 21514," dated January 10, 1962, and who elect to accept such employment under the terms and provisions of Section 3 of that agreement, and which employees have been determined as those shown in Exhibit "A" attached hereto.

3. The Sandusky District of the Scioto Division will be established as a separate seniority district embracing

the territory from Hudson Street to and including Sandusky Yard.

4. A seniority roster of trainmen will be established initially of those who have elected to accept employment with the Norfolk and Western Railway Company under the terms and provisions of Section 3 of the agreement referred to above, and the names of those who have elected to accept employment with the Norfolk and Western will be placed on the roster in the order of their seniority dates on the Pennsylvania Railroad and they will have prior rights to service on Sandusky District. New employees taken into the service on Sandusky District after the effective date of this agreement will establish seniority on the Sandusky District as of the date they first perform service on that district.

5. The employees whose names appear in Exhibit "A," attached hereto, will work under the rates of pay, rules and working conditions applicable to those employees that were in effect immediately prior to the acquisition of Sandusky Line by Norfolk and Western Railway Company.

6. This agreement shall become effective at 12:01 A. M., October 16th, 1964, and shall remain in effect until changed or modified in accordance with the provisions of the Railway Labor Act as amended.

IN WITNESS WHEREOF, the parties to this Implementing Agreement have hereunto executed the same by and through their duly authorized representatives this 27th day of October, 1964.

FOR THE NORFOLK AND WESTERN RAILWAY COMPANY

H. C. WYATT

Senior Vice President

FOR THE EMPLOYEES

J. F. MCNEEL

General Chairman, Brotherhood of Railroad Trainmen

JOINT EXHIBIT 9.

Implementing Agreement No. 1-A (BLE-BLF&E-BRT—Sandusky Line).

Agreement between Norfolk and Western Railway Company and the employees thereof on the Sandusky District of the Scioto Division represented by Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Brotherhood of Railroad Trainmen.

This Agreement is intended to implement the application of the Agreement for Protection of Employees, executed April 16, 1962, effective January 10, 1962, between the Norfolk and Western Railway Company and the national and international labor organizations representing employees of the carriers involved in the transactions which were the subject of Interstate Commerce Commission Finance Dockets Nos. 21510-21514, 21567, 21920, 22235 and 22236.

It is agreed:

1. (a) For the purposes of identification as "affected employees" of the carriers involved in the transaction which was the subject of I.C.C. Finance Docket 21512, the employees involved and covered hereby are those individuals formerly employed by the Pennsylvania Railroad who had elected to accept employment with the Norfolk and Western on the Sandusky District of the Scioto Division pursuant to Section 3 of the Agreement for Protection of Employees signed April 16, 1962, effective as of January 10, 1962, and who are hereby certified as adversely affected as of October 16, 1964.

(b) For the purposes of Section 1 of the Memorandum of Understanding effective January 10, 1962, relative to construing the above-mentioned Agreement for Protection of Employees, the "test period" for employees covered hereby shall be the period October 16, 1963—October 15, 1964, both dates inclusive. The "Average Monthly Compensation" for employees covered hereby shall be

arrived at by taking the total compensation received by the affected employee for service performed on the former Sandusky Line of Pennsylvania Railroad during the "test period" and dividing by 12; except that, if the affected employee comes within the category described in the second sentence of Section 3 of the above mentioned Agreement for Protection of Employees the total compensation received for service performed on the former Sandusky Line of Pennsylvania Railroad by the Sandusky Line employee who caused the affected employee to be displaced during the "test period" will be divided by 12 to determine the affected employee's "average monthly compensation."

(c) The foregoing does not relieve employees of handling and processing claims on and in accordance with Exhibit "A" to the above mentioned January 10, 1962, Memorandum of Understanding for payments allegedly due under the January 10, 1962, Agreement for Protection of Employees nor does it deprive the carrier of any defense against such claim which is available to the carrier under that Agreement.

2. In applying Section 1 of the above mentioned Memorandum of Understanding of January 10, 1962, in connection with the application of the January 10, 1962, Agreement for Protection of Employees when determining the "average monthly compensation" for employees who are organization representatives, it is understood that:

As to affected employees who were Local Chairmen, Grand Lodge officers, Grand Lodge representatives and delegates to labor organization conventions during the "test period," their "average monthly compensation" will first be arrived at as provided in Section 1 of the above-mentioned Memorandum of Understanding as particularized by Section 1(b) hereof. The "average monthly compensation" as thus determined will then be increased by the amount of 1.2 basic day's pay at the rate of service in which en-

gaged at the time the individual laid off for each date on which the individual lost time (or, in the case of an extra man, was laying off,) to participate in organization business, during the period of time he was employed on the former Sandusky Line of Pennsylvania Railroad during the "test period."

The dates, and rate of pay applicable to each, on which the individual lost time (or, in the case of an extra man, was laying off,) in order to participate in organization business will be certified by the individual involved and by an officer of his Grand Lodge and furnished to the designated officer of the Carrier.

3. In making adjustments as a result of "decline in volume of traffic or revenues," the following formula will be used to determine whether there has been a decline in volume of traffic or revenues and if a decline is found to have occurred, the amount of the reduction in the protective allowances which might otherwise be due the employees involved:

First: the total railway operating revenues (Line 3, Indexed Page 300, I.C.C. Report Form A) and the total revenue and non-revenue ton miles (Line 39, Indexed Page 508, I.C.C. Report Form A) of the railroads comprising the Norfolk and Western as of October 16, 1964, for each of the 12 calendar months, October 1963—September 1964, both inclusive, as reported to the Interstate Commerce Commission will be used as the base.

Second: the percentage of decline in (1) total railway operating revenues and (2) total revenue and non-revenue ton miles in any calendar month as compared to the base for the like calendar month during the period October 1963—September 1964, will each be determined.

Third: percentage of decline (1) and (2) will be totalled and that total divided by 2. The result of this calculation will be the "average percentage of decline."

Fourth: if the "average percentage of decline" as determined above is 1% or less for any calendar month, no reduction will be made. If the "average percentage of decline" is more than 1% for any calendar month, the protective allowance which might otherwise be due an employee for that calendar month shall be reduced by the "average percentage of decline" in excess of 1%.

Signed at Cleveland, Ohio, this ____ day of _____, 1965.

For the Employees:

For the Carrier:
H. C. Wyatt
Senior Vice President

General Chairman
Brotherhood of Locomotive Engineers

J. W. Price
General Chairman
Brotherhood of Locomotive Firemen and Enginemen

J. F. McNeel
General Chairman
Brotherhood of Railroad Trainmen

Approved:

Assistant Grand Chief Engineer
Brotherhood of Locomotive Engineers

C. Caldwell
Vice President
Brotherhood of Locomotive Firemen and Enginemen

J. M. King
Vice President
Brotherhood of Railroad Trainmen

JOINT EXHIBIT 10.

Letter, Oct. 25, 1965, H. C. Wyatt to J. F. McNeel.

NORFOLK AND WESTERN RAILWAY COMPANY

Cleveland, Ohio
October 25, 1965
166.18.15

Mr. J. F. McNeel, General Chairman
Brotherhood of Railroad Trainmen
Room 209, 683 East Broad Street
Columbus 13, Ohio

Dear Sir:

This has reference to the application of Section 3 of the Agreement effective January 10, 1962, for protection of employees in event of approval of merger and related applications filed by Norfolk and Western Railway Company and other Carriers, in I.C.C. Finance Dockets Nos. 21510, 21511, 21512, 21513, and 21514, to employees represented by your Committee who left the employ of the Pennsylvania Railroad Company and accepted employment with the Norfolk and Western Railway Company, effective as of October 16, 1964, the effective date of Norfolk and Western's acquisition of the "Sandusky Line."

Thus far we have not received information as to earnings of these employees on the Sandusky Line during the 12 months period immediately preceding the effective date of the acquisition. We are advised that it will be several months before this information can be made available to the Norfolk and Western.

We are in receipt of a statement of the total earnings during the 12 months prior to October 16, 1964 from employment on the Pennsylvania Railroad of each of the employees who left the employment of the Pennsylvania Railroad and accepted employment with the Norfolk and Western Railway Company October 16, 1964. Copy of that statement is enclosed herewith.

In order to start making protective allowances which may be due the employees involved under the January 10, 1962 Agreement, we are agreeable to setting up a temporary "average monthly compensation" for each such employee, which shall be 75% of the total compensation earned by such employee on the Pennsylvania Railroad during the period October 16, 1963 through October 15, 1964, divided by 12.

If such employee's compensation from the Norfolk and Western Railway Company is less in any calendar month because of the acquisition than the aforesaid temporary "average monthly compensation," he shall be paid a "displacement allowance" equal to the difference, less compensation for any time lost on account of absences to the extent he is not available for service under applicable agreement rules. All employees' temporary "average monthly compensation" shall be reduced by 15/31sts for the month of October, 1964.

When information as to compensation earned on the Sandusky Line during the 12 months immediately preceding the date of acquisition is available, any underpayments made for the period October 16, 1964 until the date the correct "average monthly compensation" figures are available will be adjusted and any overpayments made during that period will be withheld from the individual's current earnings or monthly displacement allowances, as the case may be, in installments of $20.00 each month until the total of his overpayment has been withheld.

Employees will have until December 31, 1965 to file claims on EX A Form 1, copy attached, for displacement allowances due for the period October 16, 1964 through November 30, 1965. Separate EX A Form 1 will be filed for each month for which a displacement allowance is claimed. Claims for displacement allowances which may be due for the month of December, 1965, and for any calendar month thereafter, must be made within 30 days following the end of the calendar month for which displacement allowance is claimed.

Where an employee has heretofore received a temporary advance, or advances, toward protective allowances which might be due him under the January 10, 1962 Agreement, the total amount of such temporary advances will be deducted from the amount he might be entitled to receive as temporary displacement allowances under the temporary arrangement provided for herein. In event an individual has already been advanced a sum in excess of the total amount he might now be entitled to receive as temporary displacement allowances under this arrangement, he will not be paid any temporary displacement allowance hereunder until such time as the total of the temporary displacement allowances he would be entitled to hereunder exceeds the amount of the temporary advance he has already received.

You understand that sums which individual employees may have received through the U. S. Railroad Retirement Board by way of unemployment benefits for periods during which they are paid displacement allowances by the Carrier must be withheld from the displacement allowances due the employee and remitted to that Board.

If the foregoing is acceptable to you, please so indicate in the space provided below.

Yours truly,
H. C. Wyatt
Senior Vice President

Accepted:
By J. M. McNeel
General Chairman, B. of R. T.
At Cleveland, Ohio
October 25, 1965

DEFENDANT'S EXHIBIT A.

Letter, April 23, 1962, H. C. Wyatt to F. C. Montgomery.

NORFOLK AND WESTERN RAILWAY COMPANY

Roanoke, Virginia

April 23, 1962

Mr. F. C. Montgomery, Vice President,
Brotherhood of Railway Trainmen,
1544 Standard Building,
Cleveland 13, Ohio.

Dear Mr. Montgomery:

This letter will confirm our discussions in Washington this date of proposed agreement for protection of employees in event of approval of merger and related applications filed by Norfolk and Western Railway Company and other carriers in ICC Finance Docket Nos. 21510, 21511, 21512, 21513 and 21514. Vice President King of BRT and General Superintendent Noell of N&W joined us in this discussion.

In answer to your presentation of suggested changes in carrier proposals I replied that the agreement was already signed by practically all of the other rail brotherhoods and time did not permit a revision of this agreement, after which we discussed the meaning and interpretation of the signed agreement and your proposal. It was noted that you suggested no changes in Titles I, II, III, IV, V, VI, VII and VIII, Section 1(a).

Title VIII, Section 1(b):

In your suggested deletion of Section 1(b) of the signed agreement and substitution of other language, particularly in addition of spelling out protection accorded employees in case of economies undertaken by carrier because of the merger including, but not specifically limited to installation of centralized traffic control, mechanized maintenance of way work, modernization of equipment programs, abandonment or curtailment of existing facilities and shops, relocation of maintenance and repair work, changes in any existing work now performed on the

Norfolk and Western or Virginian pursuant to existing agreements, changes pursuant to any integration of employment forces, or other such economies or changes resulting from the merger, at any time during such employment, my reply was in meeting with committee of RLEA several months earlier, President Gilbert, who I understand was representing the operating brotherhoods, asked me the question "Is it my understanding that this agreement means and will be applied just as the so-called June 18, 1959, agreement covering your Virginian merger case is now being applied?" My reply to him and I stated to you that that is the meaning.

Title VIII, Section 1(c):

In discussing your proposed revision of the language of this section you pointed out that your primary concern was twofold. First, that we would be bound by the terms of all existing contracts, schedules, agreements and practices concerning rates of pay, rules, working conditions and fringe benefits of employees in effect at the time of consummation of such merger and will be bound by the terms and provisions thereof the same as if signatory or party thereto, subject to change in accordance with the Railway Labor Act, as amended. My reply here was the same as for Section 1(b), that this was our intention just as it has been applied in the Virginian merger case.

The second matter of concern was the recognition of the duly authorized and designated representatives of the employees in each bargaining unit of the merged line of railroad and our continuing the existing application of the said contracts, schedules, agreements and practices including a continuation of employees' representatives being able to hold conferences pertaining to disputes or on other matters at the customary places existing today. My reply was that we will maintain headquarters staffs, including personnel officer authorized to act, at both Cleveland and St. Louis.

Title VIII, Section 1(d):

You have suggested additional language to this section reading "It is fully understood that this agreement

to arbitrate disputes arising under this agreement or under the Washington Job Protection Agreement as provided above does not write out any provision of the existing contracts between the parties and any dispute relative thereto will be handled under the Railway Labor Act, as amended and will not be subject to this agreement." Mr. Noell and I replied to you that under the proposed agreement it is not our intention to take advantage of arbitration provisions in settling matters covered by the existing contracts on the individual properties.

Title VIII, Section 2:

You suggested eliminating from this section references to Section 3. I stated to you that the same understanding previously outlined will apply to employees of the Wabash, the Akron, Canton and Youngstown Railroad Company and the Pittsburgh and West Virginia Railway if and when said line or lines are leased to, controlled by or merged into the Norfolk and Western.

Title VIII, Section 3:

Repeating the fact that it is too late to change the proposed agreement, Mr. Noell and I outlined to you and Mr. King our intentions with respect to PRR employees of your representation involved in our purchase of the so-called Sandusky Line. This line between Columbus, Ohio and Sandusky, Ohio, will serve as the connecting link between the Norfolk and Western at Columbus and the Nickel Plate at Bellevue. It would be operated as a district of the Norfolk and Western's Scioto Division. This division now embodies separate freight seniority districts, namely the Kenova, Columbus and Cincinnati Districts. The new district would likewise be one of separate seniority. At a reasonable time prior to the effective date of the merger, PRR employees working on having seniority on the Sandusky Line would be given the election of severing their relationship with the PRR and establishing employment rights on the new Sandusky District or exercising their seniority on other districts of the PRR. The employees' position on the seniority roster of the new

Sandusky District would be in line with their seniority on the existing seniority district. The election by the individuals would be in order of their seniority, beginning with the senior.

The protection afforded these employees of the PRR would be in direct ratio to service on the district in the previous 12 months. This would apply not only to the employee who actually rendered that service, but also to a junior employee who may be displaced by reason of the senior employee electing to exercise his seniority on other districts of the PRR, but again limited to the service of the senior employee during the prior 12 months. It is also understood that a deadline or cut-off date will be set for the exercising of their election.

In answer to your question as to our agreeableness to take over and assume all contracts, schedules and agreements having application on said Sandusky Line between the Pennsylvania Railroad and your organization, my reply was affirmative.

Title VIII, Section 4:

You suggested additional language to this section reading as follows:

"The parties hereto are cognizant that the provisions of this Agreement must be implemented by appropriate additional agreements, and nothing herein will serve to bar the making of such implementing agreements by the Norfolk and Western and the designated representative of the affected employees. Any changes in seniority rights, working conditions, agreements, job assignments, operating rules, etc., contemplated or deemed necessary because of the merger will be held in abeyance until implementing agreements have been reached with the representatives of the affected employees covering their rights, privileges and protection."

You were told that we recognize the necessity of covering basic changes in employees' working conditions involved in this merger before such changes can be made effective. This was done prior to the merger with the Virginian and such a policy would be continued in this

merger transaction. It is further understood that in seeking such implementing agreements we will give the organization sufficient advance notice for their full and complete investigation and consideration.

Title VIII, Section 5:

No suggested change.

Title VIII, Section 6:

You raised the question as to the effective date of the agreement. This section of the agreement specifies that the effective date shall be January 10, 1962. In reply to your question as to the employees protected by this agreement, I replied to you that the protection covered employees as of the effective date of this agreement (January 10, 1962) or subsequent thereto up to and including the date the merger is consummated as outlined in Section 1(b).

In our discussion of Memorandum of Understanding lettered "A," you requested a more definite advance notice. My reply was that any major change in operations affecting employment required implementing agreements and as understood in our discussion of the agreement, this should afford protection for a situation causing you concern. I could not agree to grant a definite minimum period of advance notice.

You also expressed concern as to the arbitrary diversion of traffic without knowledge of the employees and in the absence of implementing agreement. Here again I stated that it was our purpose and intent to follow the same practice as in the case of the Virginian merger, where before traffic was diverted the various organizations were called in, the plan of diversion explained to them and implementing agreements drawn up to cover the situation.

You also asked if Paragraph 3 of this Memorandum of Understanding, which deals with the protective benefits of the agreement effective January 10, 1962, for officials, supervisory or excepted personnel exercising seniority rights in craft or class of employees protected by said agreement would likewise apply to a furloughed employee

serving as General Chairman or other office of your organization. My reply was that it would cover such an individual.

Under Paragraph 5 of this memorandum, dealing with the transfer of an employee, you asked if the terminology "general locality" would cover a situation where a yard man would be required to accept employment in another yard 300 miles away and in which he held no seniority. My reply was in the absence of an implementing agreement he could not be required to do so. You also asked if this yard man would be required to accept employment as a road brakeman on a division operating out of his yard. My reply was that assuming that this yard man's seniority was confined to the yard and he held no road seniority, then we could not require him to accept employment as a road brakeman, and in reply to your further question, I pointed out that it is fully understood that under this agreement an employee can not be required to accept employment outside his seniority district; however, in cases where we would have such an employee without work, we would urge him to accept employment in any of the seniority districts where vacancies existed and would ask for your cooperation in accomplishing this, but again with the full understanding he can not be forced to take such action short of an appropriate implementing agreement.

Under the Memorandum of Understanding lettered "B" you questioned the intention of Paragraph 1 and I pointed out that its language intended to make clear that the adversely affected was confined to the merger connection and the formula for determining payments to such an employee. You raised the question under Item 3 on the promptness of paying the displacement allowance. My reply was that investigation developed that while the payments initially were some several months late, under the existing procedure the payments are being made within 30 to 60 days. It is our expectation to make continued improvements and reasonably soon make all payments within 30 days.

Under 4 you questioned the 30-day limit for the filing of claims. It is my understanding that for the past four or five months this arrangement has proven satisfactory in the handling of claims arising from the N&W-Virginian merger. Under Item 4 you pointed out that your two General Chairmen who have been handling claims for N&W and former Virginian employees would much prefer to continue this practice, rather than have the individual employee submit his individual claim to the company, with a copy to the local chairman. My reply was that we would have no objection to such handling.

Yours very truly,

H. C. WYATT,
Vice President and
General Manager.

Cy: Mr. J. M. King, *Vice Pres.,*
Brotherhood Railway Trainmen.
Mr. W. A. Noell, *Gen. Supt.,*
Norfolk and Western Railway Co.

DEFENDANT'S EXHIBIT C.

Letter, July 13, 1965, J. F. McNeel to F. A. Johnson.

GENERAL GRIEVANCE COMMITTEE
BROTHERHOOD OF RAILROAD TRAINMEN
Columbus, Ohio 43215
July 13, 1965

Mr. F. A. Johnson, Manager-Personnel
Norfolk & Western Railroad Company
2912 Terminal Tower Bldg.—P.O. Box 6119
Cleveland, Ohio 44101

Dear Sir:

On May 26, 1965, Secretary P. V. Hemmer and I discussed the Agreement known as Implementing Agreement No. 1-A on the Sandusky District, Scioto Division. This Agreement deals with the 'average monthly compensation' of the trainmen employes on this District.

We are very much concerned that such a long time has elapsed since the date of October 16, 1964, at which time all the employes who transferred to the N. & W. Railroad Company from the Pennsylvania Railroad Company were adversely effected.

We know that you have had difficulty in getting the earnings of these men for the period from October 16, 1963, to October 15, 1964, inclusive, from the Pennsylvania Railroad Company. However it is our understanding that you are now in possession of these earnings figures, but we still have not been able to get this Agreement signed.

While we appreciate the concession which you made orally wherein any employee who has suffered a loss of average monthly earnings while on the Sandusky District, could write to Mr. Scott, Superintendent at Portsmouth and request an adjustment in the guaranteed earnings each individual felt was now due him, it was our understanding that the men making this request should show a bona fide necessity for this adjustment.

While this has helped somewhat, we still feel you should, without further delay, arrange to complete the list of Certified Test Period Earnings that should accompany Implementing Agreement No. 1-A and arrange for this Agreement to be consummated.

Please give this matter your immediate attention and advise.

Yours very truly,
J. F. McNeel
General Chairman

cc:J.M.King,VP BRT
W.L.Butler,LC #844
H.I.Fearing,S-T "
C.R.Mick, LC #141
G.C.Gibson,Sec. "
PVH:HB

DEFENDANT'S EXHIBIT D.

Letter, July 27, 1965, Manager Personnel-Western Region to J. F. McNeel.

NORFOLK AND WESTERN RAILWAY COMPANY

At Cleveland, Ohio
July 27, 1965

Mr. J. F. McNeel, General Chairman
Brotherhood of Railroad Trainmen
Room 209, 683 E. Broad Street
Columbus, Ohio 43206

Dear Sir:

This is in reply to your letter of July 13, 1965, relative to earnings on Sandusky Line during the period October 16, 1963, to October 15, 1964, of those former employees of the Pennsylvania Railroad Company who elected to accept employment with the Norfolk and Western Railway Company on October 16, 1964.

As of this time, the information as to earnings necessary to implement Section 3 of the Agreement effective January 10, 1962, for Protection of Employees in event of approval of merger and related applications filed by the Norfolk and Western Railway Company and other carriers in I.C.C. Finance Dockets Nos. 21510, 21511, 21512, 21513, and 21514 has not been received by this company. While we have received some information, it is not adequate, and it would appear in the best interest of all concerned that when information as to Test Period Earnings is furnished, it be correct.

You will be advised further as soon as we are in a position to do so.

Yours truly,

Manager Personnel
Western Region

bcc: Mr. F. K. Day, Jr.
Mr. W. A. Noell

DEFENDANT'S EXHIBIT E.

Letter, October 8, 1965, J. F. McNeel to H. C. Wyatt.

GENERAL GRIEVANCE COMMITTEE
BROTHERHOOD OF RAILROAD TRAINMEN

October 8, 1965

Mr. H. C. Wyatt
Senior Vice-President
Norfolk & Western Railway Company
Roanoke, Virginia

Dear Sir:

This has reference to Section 3 of the January 10, 1962 Agreement, entitled "Agreement for Protection of Employes in Event of Approval of Merger and Related Applications" filed by Norfolk and Western Railway Company in I.C.C. Finance Dockets Nos. 21510, 21511, 21512, 21513 and 21514.

Under this Section you are required to enter into an Agreement to implement the January 10, 1962 Agreement for protection of employes, which Agreement would clearly identify the employes adversely affected as a result of having elected to take employment with the Norfolk and Western Railway Company on October 16, 1964, the date said Company acquired the Sandusky Line of the Pennsylvania Railroad Company as outlined in I.C.C. Finance Docket No. 21512.

Accompanying this Implementing Agreement there must be a list of all adversely affected employes showing their Certified Test Period Earnings. It has been over eleven (11) months since the merger was consummated and, as of this date, in spite of every effort on our part, we have been unable to get the Norfolk and Western Railway Company to consummate the above referred to Implementing Agreement encompassing the certified Test Period Earnings List.

On April 9, 1965, Brotherhood of Railroad Trainmen Vice-President J. M. King accompanied by Secretary P. V. Hemmer of the Pennsylvania Railroad General Grievance

Committee-Lines West, representing the undersigned, and the Local Chairman of the Brotherhood of Railroad Trainmen Lodges 844 and 141 met with your representative, Mr. F. A. Johnson, Manager-Personnel, Western Region in Cleveland, Ohio on this matter.

At this time, Mr. Johnson presented an Implementing Agreement of this nature above referred to, which we agreed would be satisfactory, if a separate letter of understanding would be issued by you that would indicate Mr. A. F. Strack, a trainman who holds seniority on the Sandusky District of the Scioto Division, and is presently on leave of absence due to being a BRT Insurance Field Supervisor, would have the same certified test period earnings and protection features as the man who follows him on the present Sandusky District, Scioto Division, Norfolk and Western Railway Company Roster.

During our recent negotiations on the Columbus-Toledo Interdivisional runs starting in February, 1965 and terminating in May, 1965, we approached Mr. Johnson many times on this matter to no avail.

On July 13, 1965 I wrote Mr. Johnson again requesting that the Certified Test Period Earnings list be completed and the Implementing Agreement be consummated. On July 27, 1965 Mr. Johnson answered my letter stating:

> "As of this time, the information as to earnings necessary to implement Section 3 of the Agreement effective January 10, 1962, for Protection of Employees in event of approval of merger and related applications filed by the Norfolk and Western Railway Company and other carriers in I.C.C. Finance Dockets Nos. 21510, 21511, 21512, 21513 and 21514 has not been received by this company. While we have received some information, it is not adequate, and it would appear in the best interest of all concerned that when information as to Test Period Earnings is furnished, it be correct.
>
> You will be advised further as soon as we are in a position to do so."

On September 3, 1965 I wrote Mr. Johnson as follows:

"This refers to your letter of July 27, 1965, reading:

"This is in reply to your letter of July 13, 1965, relative to earnings on Sandusky Line during the period October 16, 1963, to October 15, 1964, of those former employees of the Pennsylvania Railroad Company who elected to accept employment with the Norfolk and Western Railway Company on October 16, 1964.

As of this time, the information as to earnings necessary to implement Section 3 of the Agreement effective January 10, 1962, for Protection of Employees in event of approval of merger and related applications filed by the Norfolk and Western Railway Company and other carriers in I.C.C. Finance Dockets Nos. 21510, 21511, 21512, 21513, and 21514 has not been received by this company. While we have received some information, it is not adequate, and it would appear in the best interest of all concerned that when information as to Test Period Earnings is furnished, it be correct.

You will be advised further as soon as we are in a position to do so."

I refer you to the language of my letter of July 13, 1965, reading in part as follows—"However it is our understanding that you are now in possession of these earnings figures, but we still have not been able to get this Agreement signed."

The above understanding was arrived at from your oral assertion to me on May 26, 1965, at Cleveland, Ohio witnessed by Secretary P. V. Hemmer and Local Chairman C. R. Mick, that you were now in possession of the earnings figures for the period October 16, 1963, to October 15, 1964, pertaining to the employes of the Sandusky Line while in the employ of The Pennsylvania Railroad Company who elected to take employment to the Norfolk and Western Railway Company on October 16, 1964, but

you thought they were too high and you felt further investigation was needed. We asked you at the time to give us the figures you had acquired with the thought that we might be able to explain them. This you declined to do, but requested more time to further investigate the matter.

As of July 13, 1965, we had no further word from you on this matter and reasoning that you now had had sufficient time to 'further investigate' the figures in your possession and requested that you arrange to complete this list of Certified Test Period Earnings that must accompany Implementing Agreement 1-A and arrange for this Agreement to be consummated.

Your reason for further delay, as specified in your letter of July 27, 1965, is just not satisfactory to me in view of our conversation on May 26, 1965.

This leaves me with the opinion that you have not complied with Section 3, of the January 10, 1962, Agreement and after almost ten months have elapsed since the Sandusky Lime Employees have been adversely affected, you apparently have no intention of complying with Section 3.

Therefore, you leave me with no alternative but to take the steps outlined in Section 1 (d) of the January 10, 1962 Agreement providing you do not arrange to consummate this Agreement within a reasonable time from receipt of this letter."

Since I have had no answer to this letter from Mr. Johnson, and reasoning that sufficient time has elapsed in which an Implementing Agreement encompassing the Certified Test Period Earnings should have been consummated, I have no alternative but to invoke Section 1 (d) of the January 10, 1962 Agreement.

As provided in Section 1(d) of the above mentioned Agreement, please select your Member of the Arbitration Committee within ten (10) days and advise the undersigned and the Brotherhood of Railroad Trainmen Member of the Arbitration Committee as to his name and address. Mr. J. M. King, Vice-

President, Brotherhood of Railroad Trainmen is designated as the BRT Member and should be addressed 807 Republic Building, Louisville, Kentucky.

Yours very truly,
J. F. McNEEL
General Chairman

cc: C. Luna, President
J. M. King, VP-BRT
Walter L. Butler, LC No. 844
H. I. Fearing, Sec. No. 844
C. R. Mick, LC No. 141
G. C. Gibson, Sec. No. 141
PVH: pm

DEFENDANT'S EXHIBIT F.

Letter, October 15, 1965, Senior Vice President to J. F. McNeel.

October 15, 1965.

Mr. J. F. McNeel, General Chairman
Brotherhood of Railroad Trainmen
Room 209
683 East Broad Street
Columbus, Ohio 43215

Dear Mr. McNeel:

This will acknowledge your letter of October 8, 1965, advising us, in effect, that you desire to proceed under Section 1 (d) of the merger agreement dated April 16, 1962, and effective January 10, 1962.

This is to advise that Mr. F. A. Johnson will represent our Company on the Arbitration Committee. Mr. Johnson will contact your Mr. J. M. King, at the address referred to in your said letter, in order to endeavor to select a third member of such Arbitration Committee who will serve as chairman.

You will note that I have sent Messrs. Johnson and King a copy of this letter.

Yours very truly,

Senior Vice President

cc:
Mr. F. A. Johnson, Manager Personnel
Norfolk and Western Railway Company
Mr. J. M. King, Vice President
Brotherhood of Railroad Trainmen

DEFENDANT'S EXHIBIT G.

Letter, October 19, 1965, Manager Personnel to J. M. King.

October 19, 1965
166.18.15

Mr. J. M. King
Vice President, B. of R. T.
807 Republic Building
Louisville, Kentucky

Dear Sir:

Please refer to Mr. J. F. McNeel's letter of October 8, 1965, addressed to Mr. H. C. Wyatt, Senior Vice President, and to Mr. Wyatt's letter of October 15, 1965, in response thereto; also our telephone conversation on October 18, 1965, in connection therewith, all regarding the application of Section 3 of the Agreement effective January 10, 1962 for protection of employees in event of approval of merger and related applications filed by Norfolk and Western Railway Company and other Carriers in ICC Finance Docket Nos. 21510, 21511, 21512, 21513 and 21514.

As stated to you in our telephone conversation on October 18, 1965, I can meet with you in Room 2912, Terminal Tower Building, Cleveland, Ohio, on Monday, October 25, 1965, as soon as convenient after your arrival in Cleveland, (it is my understanding from our telephone conversation that you have commitments for the remainder of the week of October 18), for the purpose of selecting the third member of the Arbitration Committee, which Mr. McNeel, in his October 8th letter to Mr. Wyatt, asked be appointed.

It was also suggested to you during our telephone conversation that, in view of the fact the Norfolk and Western is and has at all times been willing to fulfill the obligation imposed upon it by Section 3 of the above mentioned January 10, 1962 Agreement, as soon as necessary earnings data could be obtained, we endeavor to arrive at a temporary arrangement on October 25, 1965, under

which some protective payments may be made to the employees involved pending receipt of necessary earnings data and under which any over or under payments which might be made pursuant to such temporary arrangement will be corrected when the earnings data is obtained.

Yours truly,

Manager Personnel

cc Mr. J. M. King
Vice President B. of R. T.
Route 1
Prattville, Alabama

bcc Mr. H. C. Wyatt

DEFENDANT'S EXHIBIT H.

Letter, October 25, 1965, F. A. Johnson to J. F. McNeel.

NORFOLK AND WESTERN RAILWAY COMPANY

Cleveland, Ohio
October 25, 1965

Mr. J. F. McNeel, G. C.
B. of R. T.
Room 209—683 E. Broad Street
Columbus 13, Ohio

Dear Sir:

During conference in Cleveland on April 9, 1965 in connection with the application of Section 3 of the January 10, 1962 Agreement for Protection of Employees, at which your organization was represented by Messrs. King, Hammer and Mick, the matter of determining an "average monthly compensation" for Mr. A. F. Strack, Jr., who was on leave-of-absence, serving as a Grand Lodge Representative, during the twelve months preceding the effective

date of the acquisition of the Sandusky Line by this Company was discussed.

We are willing to treat Mr. Strack as though he had earnings of $8,099.87 on the Sandusky Line during the twelve months October 16, 1963-October 15, 1964, both inclusive, for the purposes of determining an "average monthly compensation" figure for him in the event he should resume service as Trainman on the Sandusky District, provided your Committee will agree that such action will not be construed as an interpretation of Section 3 of the above-mentioned Agreement for Protection of Employees or considered as an example of a proper application of that agreement and will further agree that such action will not be referred to in connection with any other case.

If the foregoing is acceptable, please so indicate in the space provided below and return one signed copy of this letter to the undersigned.

Yours truly,
F. A. Johnson
Manager Personnel

Agreed to:
J. F. McNeel
G. C., B. of R. T.

DEFENDANT'S EXHIBIT I.

Letter, October 26, 1965, J. F. McNeel to H. C. Wyatt.

GENERAL GRIEVANCE COMMITTEE
BROTHERHOOD OF RAILROAD TRAINMEN

October 26, 1965

Mr. H. C. Wyatt
Senior Vice-President
N & W Railway Company
Roanoke, Virginia

Dear Sir:

On Monday October 25, 1965 accompanied by Vice President J. M. King and Secretary P. V. Hemmer, I met with your representative, Mr. Frank Johnson, and Mr. Fred Young and an implementing agreement under Section 3 of the January 10, 1965 Agreement and two letters of understanding were signed.

Therefore, you may consider this letter as my Notice of withdrawal of my letter of October 8, 1965, as an Arbitration Board under Section 1 (d) of the January 10, 1962 Agreement is no longer necessary.

Yours very truly,
J. F. McNeel
General Chairman

cc: C. Luna, President, BRT
J. M. King, VP-BRT
W. L. Butler, LC No. 844
H. I. Fearing, Sec. No. 844
C. R. Mick, LC No. 141
G. C. Gibson, Sec. No. 141
Mr. Frank Johnson, Mgr.-Personnel N & W
PVH:pm

DEFENDANT'S EXHIBIT L.

Letter, April 11, 1966, J. F. McNeel to H. C. Wyatt.

GENERAL GRIEVANCE COMMITTEE
BROTHERHOOD OF RAILROAD TRAINMEN

Room 209, 683 East Broad Street
Columbus, Ohio 43215

April 11, 1966

Mr. H. C. Wyatt
Senior Vice-President
N & W Railway Company
Roanoke, Virginia

Dear Sir:

This refers to your letter of April 7, 1966, referring to the conference in this office on March 31, 1966 at which you were represented by Mr. Fred Yancey, when the claims of various Sandusky District trainmen and conductors adversely affected by the merger under the provisions of Section 3 of the Agreement of January 10, 1962, were considered.

I have checked the attached list of amounts due thirty-nine (39) claimants and the figures on this sheet are correct. We will appreciate prompt payment of any amounts due and request this office and the Local Chairman be advised when these payments are made.

We want it clearly understood by all concerned that in final settlement of all these claims only the earnings made on the Sandusky District Scioto Division by the claimants should be used to offset their monthly guarantee, reasoning that only monies made on this territory were used to compile their guarantee. It just is not logical to restrict their protective guarantee earnings to monies earned in the twelve months prior to the merger on the Sandusky District only and then use monies made at Bellevue, Fostoria, N & W proper yard, Columbus, Ohio, other railroads and private industry.

As stated above, we are agreeable to accepting the amounts listed on the attached list, until this matter is

finally resolved as the claimants are in dire need of the money. We do anticipate further handling of this matter, as soon as prior commitments will allow. We will advise you of what steps we desire at some future date.

Your choice of Mr. Yancey to handle this matter is excellent, as he is well versed in the subject and certainly conducts himself in a manner which tends for amiable negotiations.

Yours very truly,
J. F. McNeel
General Chairman

cc: Mr. J. M. King, VP
Mr. C. R. Mick, LC No. 141
Mr. G. C. Gibson, Sec. No. 141
Mr. J. Fitz, LC No. 844
Mr. H. I. Fearing, Sec. No. 844
PVH:pm

DEFENDANT'S EXHIBIT P.

Letter, September 16, 1966, William E. B. Chase to J. E. Fitz with Attached Brotherhood of Railroad Trainmen Union Board of Appeals Decision in Case No. 3744.

BROTHERHOOD OF RAILROAD TRAINMEN

September 16, 1966

Mr. J. E. Fitz, LC 844,
815 Central Street,
Sandusky, Ohio 44871

Dear Sir and Brother:

Enclosed find decision of the Board of Appeals which is in connection with your appeal from the agreement dated October 25, 1965, for the protection of the employees represented by the Pennsylvania Railroad, Lines West, General Grievance Committee, who left the employ of

the Pennsylvania Railroad and accepted employment with the Norfolk and Western Railway Company effective as of October 16, 1964, the effective date of the latter's acquisition of the Sandusky Branch, Scioto Division.

With best wishes, I am

Fraternally yours,

WILLIAM E. B. CHASE
General Secretary and Treasurer.

cc: J. M. King, Vice President
J. F. McNeel, CGGC, Pennsylvania (W)
C. F. Dover, V. Chmn., GGC, Pennsylvania (W)
P. V. Hemmer, Sec'y., GGC, Pennsylvania (W)
R. C. Gibson, R&S 141
C. R. Mick, LC 141
H. I. Fearing, S&T 844

Case 3744—File 14646-B.

Appeal of J. E. Fitz, Local Chairman, Lodge 844, from the agreement dated October 25, 1965, for the protection of the employees represented by the Pennsylvania Railroad, Lines West, General Grievance Committee, who left the employ of the Pennsylvania Railroad and accepted employment with the Norfolk and Western Railway Company effective as of October 16, 1964, the effective date of the latter's acquisition of the Sandusky Branch, Scioto Division.

Under date of April 27, 1966, Local Chairman J. E. Fitz, Lodge 844, submitted the following letter of appeal to General Secretary and Treasurer W. E. B. Chase:

"We, the members of Lodge 844, are petitioning and praying for relief from the agreement of October 25, 1965, consummated between the Norfolk and Western Railway Company and the general chairman, Brother J. F. McNeel, concerning the protection and adversely affected payments to be allowed to the brothers employed on the Sandusky Branch Scioto Division, Norfolk and Western Railway.

We are also petitioning the Board of Appeals to submit this entire matter, arbitration in compliance with the I.C.C. Finance Dockets 21510 thru 21514.

"I am forwarding, with this appeal, a copy of this October 25, 1965, agreement (Exhibit A). As you can clearly see, the essence of this agreement to which we take exception, is as follows:

"1. This agreement allows 75% of compensation paid from October, 1963, until October, 1964, to trainmen employed on the Sandusky Branch.

"2. This agreement is a temporary agreement, only until such time as the earnings paid to these brothers on the Sandusky Branch, between October, 1963, and October, 1964, become available to the carrier.

"3. At such time as the carrier can obtain the earnings paid these brothers by the Pennsylvania Railroad, while in their employ, from October, 1963, until October, 1964, on the Sandusky Branch, they are then obligated to the carrier for payments of twenty (20) dollars per month for any overpayment made as a result of the Pennsylvania Railroad furnishing earnings, which the Norfolk and Western Railway will except as accurate.

"To more fully understand this situation, I will attempt to outline briefly the events leading up to this agreement. The Sandusky Branch, Scioto Division, came into being on October 16, 1964, as a result of the merger of the N&W, NKP, Wabash, ACY, PWV and the Sandusky Line (former Pennsylvania Railroad). The 96 trainmen, now employed on this division, were former employees of the Pennsylvania Railroad who held seniority on the Lake Region, Ft. Wayne Division, which encompassed Toledo, Columbus, Sandusky, Ohio, and Detroit, Michigan. As a result of this merger, this Pennsylvania Division was divided into two separate seniority districts, Toledo, Ohio, and Detroit, Michigan remaining in the Pennsylvania Railroad Ft. Wayne Division and Sandusky Yard

and the one hundred eleven (111) miles between Columbus and Sandusky forming the Sandusky Branch, Scioto Division, which was sold to the N&W Railroad as the connecting link between the N&W at Columbus and NKP at Bellevue, Ohio. At midnight, October 16, 1964, trainmen making the option to stay on the Sandusky Branch were terminated from the employ of the Pennsylvania Railroad and then became employees of the N&W, this taking place by authority of I.C.C. Finance Dockets 21510 thru 21514. The Finance Docket dealing expressly with the Sandusky line employees is numbered 21512 and specifically Section 3. It is Section 3 and the Memorandum of Understanding attached to these dockets we contend were violated in signing this temporary agreement.

"Bear in mind, these trainmen have always held seniority on the Ft. Wayne Division, Lake Region, while in the employ of the Pennsylvania Railroad and a considerable number of these brothers had most, if not all, of their earnings at Toledo, Ohio, in the years 1963 and 1964 while protecting their seniority at that point. The management of the N&W, however, contend they are only obligated to protect these men for monies earned performing service on the 111 miles of road between Columbus and Sandusky and the Sandusky yards, thereby dividing their earnings for the purpose of establishing a test period. They also contend they are only required to use earnings from October, 1963, until October, 1964. I have, to the best of my ability, dissected word for word Section 3 of Finance Docket 21512 (Exhibit B) and I fail to see what the carrier is using to support their position. Brother McNeel uses as support of his position a letter from Mr. H. C. Wyatt, Senior Vice President, N&W Railroad, addressed to Brother F. C. Montgomery, Vice President, Brotherhood of Railroad Trainmen, under date of April 23, 1962 (Exhibit C) which states on page 3, Title VIII, Section 3, second paragraph, '* * * The protection afforded these employees of the PRR would be in direct ratio to service on the district in the previous 12 months * * *' It is Brother McNeel's contention, because there

was no exception to this language, he was forced to except the N&W's position, holding only earnings paid these trainmen in the previous 12 months on the Sandusky Branch could be used in establishing a test period, this in a letter addressed to me under date of January 24, 1966 (Exhibit D).

"It is our position, whether through oversight or anything else, we fail to see why a letter signed by a vice president of the carrier has the authority to override an I.C.C. order or, for that matter, abrogate said order. We must further contend the 'Memorandum of Understanding' attached to and made a part of these Finance Dockets were utterly disregarded (Exhibit E). Here I will state our position in respect to the 'Memorandum of Understanding.'

"The 'Memorandum of Understanding,' attached to and made a part of the January 10, 1962, Agreement, (I.C.C. Finance Dockets 21510 thru 21514) (Exhibits B and E) is quite explicit in spelling out the method to be used in determining the test period.

"Under No. 1 of said understanding, it says, 'The average "monthly compensation" shall be arrived at by taking the total compensation received by the affected employe *for the last 12 months in which he performed service.*' These last ten words here italicized are, in my opinion, in their simplest form and meaning quite clear. It is our position this wording gives us the right to go back any length of time required to get 12 months service and nowhere can I find where this would restrict earnings for the test period to the previous 12 months, in this case October, 1963, to October, 1964. This language is identical to the language contained in the Washington Job Protection Agreement of 1936, Section 6, paragraph C.

"I will point out, also, in the heading of the memorandum it says, 'in construing that certain Agreement for protection of Employees in Event of Merger and related Applications filed by Norfolk and Western Railway Company and other Carriers in I.C.C. Finance Docket Nos. 21510, 21511, *21512,* 21513 and 21514 effective January

10, 1962, between Norfolk and Western Railway Company and certain national and international organizations signatory thereto, it is understood and agreed between the parties signatory hereto as follows, etc.' By this wording we are not excluded or discriminated against, quite to the contrary, we are very definitely included, by the inclusion of Finance Docket No. *21512,* here italicized. It is, therefore, our contention Section 3 of Finance Docket 21512 cannot be applied in determining the test period. This is further guaranteed by Section 5 of 'Memorandum of Understanding' and again I quote, 'This Memorandum of Understanding is applicable to the employees represented by the organizations signatory hereto, and *supersedes all existing agreements* which may be in conflict herewith.' Our argument on this point is, the Memorandum of Understanding *supersedes all existing agreements,* and it is our contention it also supersedes Section 3 of the Finance Docket 21512 by virtue of the fact you can not have a Memorandum of Understanding before you have something that needs understanding, hence, Section 3 of Finance Docket 21512 came first and the Memorandum supersedes that.

"I have one more letter written by Brother F. C. Montgomery, Vice President, B. of R. T., to Mr. H. C. Wyatt, Vice President, N&W Railway, under date of February 23, 1966 (Exhibit F), written at my request and on our behalf wherein he again states our position in this matter. I am not yet in receipt of Mr. Wyatt's answer to this position; however, at such time as this becomes available to me, I will forward it to the Board and include it as material for this appeal.

"I am requesting a oral hearing be granted on this appeal in behalf of the brothers I represent of Cedar Point Lodge 844.

"I should like to take this opportunity to thank you, brothers, now, for all your efforts and consideration on this matter."

Exhibits marked A, B, C, D, E and F submitted with Brother Fitz' appeal are reproduced as follows:

EXHIBIT A

"NORFOLK AND WESTERN RAILWAY COMPANY

Cleveland, Ohio
October 25, 1965

"Mr. J. F. McNeel, General Chairman,
Brotherhood of Railroad Trainmen,
Room 209, 683 East Broad Street,
Columbus 13, Ohio

"Dear Sir:

"This has reference to the application of Section 3 of the Agreement effective January 10, 1962, for protection of employees in event of approval of merger and related applications filed by Norfolk and Western Railway Company and other Carriers, in I.C.C. Finance Dockets Nos. 21510, 21511, 21512, 21513 and 21514 to employees represented by your Committee who left the employ of the Pennsylvania Railroad Company and accepted employment with the Norfolk and Western Railway Company, effective as of October 16, 1964, the effective date of Norfolk and Western's acquisition of the 'Sandusky Line.'

"Thus far, we have not received information as to earnings of these employees on the Sandusky Line during the 12 months period immediately preceding the effective date of the acquisition. We are advised that it will be several months before this information can be made available to the Norfolk and Western.

"We are in receipt of a statement of the total earnings during the 12 months prior to October 16, 1964, for employment on the Pennsylvania Railroad of each of the employees who left the employment of the Pennsylvania Railroad and accepted employment with the Norfolk and Western Railway Company October 16, 1964. Copy of that statement is enclosed herewith.

"In order to start making protective allowances which may be due the employees involved under the January 10, 1962, Agreement, we are agreeable to setting up a temporary 'average monthly compensation' for each such employee, which shall be 75% of the total compensation earned by such employe on the Pennsylvania Railroad during the period October 16, 1963, through October 15, 1964, divided by 12.

"If such employe's compensation from the Norfolk and Western Railway Company is less in any calendar month because of the acquisition than the aforesaid temporary 'average monthly compensation,' he shall be paid a 'displacement allowance' equal to the difference, less compensation for any time lost on account of absences to the extent he is not available for service under applicable agreement rules. All employees' temporary 'average monthly compensation' shall be reduced by 15/31sts for the month of October, 1964.

"When information as to compensation earned on the Sandusky Line during the 12 months immediately preceding the date of acquisition is available, any underpayments made for the period October 16, 1964, until the date the correct 'average monthly compensation' figures are available will be adjusted and any overpayments made during that period will be withheld from the individual's current earnings or monthly displacement allowances, as the case may be, in installments of $20.00 each month until the total of his overpayment has been withheld.

"Employees will have until December 31, 1965, to file claims on EX A Form 1, copy attached, for displacement allowances due for the period October 16, 1964, through November 30, 1965. Separate EX A Form 1 will be filed for each month for which a displacement allowance is claimed. Claims for displacement allowances which may be due for the month of December, 1965, and for any calendar month thereafter, must be made within 30 days following the end of the calendar month for which displacement allowance is claimed.

"Where an employe has heretofore received a temporary advance, or advances, toward protective allowances which might be due him under the January 10, 1962, Agreement, the total amount of such temporary advances will be deducted from the amount he might be entitled to receive as temporary displacement allowances under the temporary arrangement provided for herein. In event an individual has already been advanced a sum in excess of the total amount he might now be entitled to receive as temporary displacement allowances under this arrangement, he will not be paid any temporary displacement allowance hereunder until such time as the total of the temporary displacement allowances he would be entitled to hereunder exceeds the amount of the temporary advance he has already received.

"You understand that sums which individual employees may have received through the U. S. Railroad Retirement Board by way of unemployment benefits for periods during which they are paid displacement allowances by the Carrier must be withheld from the displacement allowances due the employee and remitted to that Board.

"If the foregoing is acceptable to you, please so indicate in the space provided below.

Yours truly,
/s/ H. C. Wyatt
Senior Vice President

"Accepted:
/s/ J. M. McNeel
General Chairman, B. of R. T.
At Cleveland, Ohio
October 25, 1965."

EXHIBIT B

(Due to the length of Exhibit B, "Agreement for Protection of Employees in Event of Merger and Related Applications Filed by Norfolk and Western Railway Company and Other Carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513 and 21514," the Agreement will not be reproduced here but will be placed in the file for the Board's ready reference.)

EXHIBIT C

"Norfolk and Western Railway Company
Roanoke, Virginia
April 23, 1962

"Mr. F. C. Montgomery, Vice President
Brotherhood of Railway Trainmen,
1544 Standard Building,
Cleveland 13, Ohio

"Dear Mr. Montgomery:

"This letter will confirm our discussions in Washington this date of proposed agreement for protection of employees in event of approval of merger and related applications filed by Norfolk and Western Railway Company and other carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513 and 21514. Vice President King of BRT and General Superintendent Noell of N&W joined us in this discussion.

"In answer to your presentation of suggested changes in carrier proposals, I replied that the agreement was already signed by practically all of the other rail brotherhoods and time did not permit a revision of this agreement, after which we discussed the meaning and interpretation of the signed agreement and your proposal. It was noted that you suggested no changes in Titles I, II, III, IV, V, VI, VII and VIII, Section 1(a).

"Title VIII, Section 1(b):

"In your suggested deletion of Section 1(b) of the signed agreement and substitution of other language, particularly in addition of spelling out protection accorded employees in case of economies undertaken by carrier because of the merger including, but not specifically limited to installation of centralized traffic control, mechanized maintenance of way work, modernization of equipment programs, abandonment or curtailment of existing facilities and shops, relocation of maintenance and repair work, changes in any existing work now performed on the Norfolk and Western or Virginian pursuant to existing agreements, changes pursuant to any integration of employment forces, or other such economies or changes resulting from the merger, at any time during such employment, my reply was in meeting with the committee of RLEA several months earlier, President Gilbert, who I understand was representing the operating brotherhoods, asked me the question, 'Is it my understanding that this agreement means and will be applied just as the so-called June 18, 1959, Agreement covering your Virginian merger case is now being applied?' My reply to him and I stated to you that that is the meaning.

"Title VIII, Section 1(c):

"In discussing your proposed revision of the language of this section, you pointed out that your primary concern was twofold. First, that we would be bound by the terms of all existing contracts, schedules, agreements and practices concerning rates of pay, rules, working conditions and fringe benefits of employees in effect at the time of consummation of such merger and will be bound by the terms and provisions thereof the same as if signatory or party thereto, subject to change in accordance with the Railway Labor Act, as amended. My reply here was the same as for Section 1(b), that this was our intention just as it has been applied in the Virginian merger case.

"The second matter of concern was the recognition of the duly authorized and designated representatives of the

employees in each bargaining unit of the merged line of railroad and our continuing the existing application of the said contracts, schedules, agreements and practices including a continuation of employees' representatives being able to hold conferences pertaining to disputes or on other matters at the customary places existing today. My reply was that we will maintain headquarters staffs, including personnel officer authorized to act, at both Cleveland and St. Louis.

"Title VIII, Section 1(d):

"You have suggested additional language to this section reading, 'It is fully understood that this agreement to arbitrate disputes arising under this agreement or under the Washington Job Protection Agreement as provided above does not write out any provision of the existing contracts between the parties and any dispute relative thereto will be handled under the Railway Labor Act, as amended and will not be subject to this agreement.' Mr. Noell and I replied to you that under the proposed agreement, it is not our intention to take advantage of arbitration provisions in settling matters covered by the existing contracts on the individual properties.

"Title VIII, Section 2:

"You suggested eliminating from this section references to Section 3. I stated to you that the same understanding previously outlined will apply to employees of the Wabash, the Akron, Canton and Youngstown Railroad Company and the Pittsburgh and West Virginia Railway if and when said line or lines are leased to, controlled by or merged into the Norfolk and Western.

"Title VIII, Section 3:

"Repeating the fact that it is too late to change the proposed agreement, Mr. Noell and I outlined to you and Mr. King our intentions with respect to PRR employees of your representation involved in our purchase of the so-called Sandusky Line. This line between Columbus, Ohio, and Sandusky, Ohio, will serve as the connecting link between the Norfolk and Western at Columbus and the

Nickel Plate at Bellevue. It would be operated as a district of the Norfolk and Western's Scioto Division. This division now embodies separate freight seniority districts; namely, the Kenova, Columbus and Cincinnati Districts. The new district would likewise be one of separate seniority. At a reasonable time prior to the effective date of the merger, PRR employees working or having seniority on the Sandusky Line would be given the election of severing their relationship with the PRR and establishing employment rights on the new Sandusky District or exercising their seniority on other districts of the PRR. The employee's position on the seniority roster of the new Sandusky District would be in line with their seniority on the existing seniority district. The election by the individuals would be in order of their seniority, beginning with the senior.

"The protection afforded these employees of the PRR would be in direct ratio to service on the district in the *previous 12 months*. This would apply not only to the employe who actually rendered that service, but also to a junior employe who may be displaced by reason of the senior employe electing to exercise his seniority on other districts of the PRR, but again limited to the service of the senior employe during the prior 12 months. It is also understood that a deadline or cut-off date will be set for the exercising of their election.

"In answer to your question as to our agreeableness to take over and assume all contracts, schedules and agreements having application on said Sandusky Line between the Pennsylvania Railroad and your organization, my reply was affirmative.

"Title VIII, Section 4:

"You suggested additional language to this section reading as follows:

> 'The parties hereto are cognizant that the provisions of this Agreement must be implemented by appropriate additional agreements, and nothing herein will serve to bar the making of such implementing agreements by the Norfolk and Western and the des-

ignated representatives of the affected employees. Any changes in seniority rights, working conditions, agreements, job assignments, operating rules, etc., contemplated or deemed necessary because of the merger will be held in abeyance until implementing agreements have been reached with the representatives of the affected employees covering their rights, privileges and protection.'

"You were told that we recognize the necessity of covering basic changes in employees' working conditions involved in this merger before such changes can be made effective. This was done prior to the merger with the Virginian and such a policy would be continued in this merger transaction. It is further understood that, in seeking such implementing agreements, we will give the organization sufficient advance notice for their full and complete investigation and consideration.

"Title VIII, Section 5:

"No suggested change.

"Title VIII, Section 6:

"You raised the question as to the effective date of the agreement. This section of the agreement specifies that the effective date shall be January 10, 1962. In reply to your question as to the employees protected by this agreement, I replied to you that the protection covered employees as of the effective date of this agreement (January 10, 1962) or subsequent thereto up to and including the date the merger is consummated as outlined in Section 1(b).

"In our discussion of Memorandum of Understanding lettered 'A,' you requested a more definite advance notice. My reply was that any major change in operations affecting employment required implementing agreements and as understood in our discussion of the agreement, this should afford protection for a situation causing you concern. I could not agree to grant a definite minimum period of advance notice.

"You also expressed concern as to the arbitrary diversion of traffic without knowledge of the employees and in the absence of implementing agreement. Here again I stated that it was our purpose and intent to follow the same practice as in the case of the Virginian merger, where before traffic was diverted the various organizations were called in, the plan of diversion explained to them and implementing agreements drawn up to cover the situation.

"You also asked if Paragraph 3 of this Memorandum of Understanding, which deals with the protective benefits of the agreement effective January 10, 1962, for officials, supervisory or excepted personnel exercising seniority rights in craft or class of employees protected by said agreement would likewise apply to a furloughed employe serving as general chairman or other office of your organization. My reply was that it would cover such an individual.

"Under Paragraph 5 of this memorandum, dealing with the transfer of an employe, you asked if the terminology 'general locality' would cover a situation where a yard man would be required to accept employment in another yard 300 miles away and in which he held no seniority. My reply was in the absence of an implementing agreement he could not be required to do so. You also asked if this yard man would be required to accept employment as a road brakeman on a division operating out of his yard. My reply was that assuming that this yard man's seniority was confined to the yard and he held no road seniority, then we could not require him to accept employment as a road brakeman, and in reply to your further question, I pointed out that it is fully understood that under this agreement an employe can not be required to accept employment outside his seniority district; however, in cases where we would have such an employee without work, we would urge him to accept employment in any of the seniority districts where vacancies existed and would ask for your cooperation in accomplishing this, but again with the full understanding he can not be

forced to take such action short of an appropriate implementing agreement.

"Under the Memorandum of Understanding lettered 'B' you questioned the intention of Paragraph 1 and I pointed out that its language intended to make clear that the adversely affected was confined to the merger connection and the formula for determining payments to such an employe. You raised the question under Item 3 on the promptness of paying the displacement allowance. My reply was that investigation developed that while the payments initially were some several months late, under the existing procedure the payments are being made within 30 to 60 days. It is our expectation to make continued improvements and reasonably soon make all payments within 30 days.

"Under 4, you questioned the 30-day limit for the filing of claims. It is my understanding that for the past four or five months this arrangement has proven satisfactory in the handling of claims arising from the N&W-Virginian merger. Under Item 4, you pointed out that your two general chairmen who have been handling claims for N&W and former Virginian employees would much prefer to continue this practice, rather than have the individual employe submit his individual claim to the company, with a copy to the local chairman. My reply was that we would have no objection to such handling.

"Yours very truly,
/s/ H. C. Wyatt
Vice President and
General Manager.

"cc: Mr. J. M. King, Vice Pres.,
Brotherhood Railroad Trainmen.
Mr. W. A. Noell, Gen. Supt.,
Norfolk and Western Railway Co.

EXHIBIT D.

"Room 209, 683 East Broad Street
Columbus, Ohio 43215
January 24, 1966

"Mr. J. E. Fitz, Local Chairman,
Lodge 844

"Dear Sir and Brother:

"This refers to your letters of January 13, 1966, to President C. Luna and me concerning the Letter of Understanding under Section 3 of the January 10, 1962, Agreement for Protection of Employees as a result of the Sandusky Line being purchased from the P.R.R. Co. by the N. & W. Railway Company as outlined in I.C.C. Finance Docket 21512. This letter was signed effective October 25, 1965.

"In your one letter of January 13, 1966, you stated that you agreed to accept the conditions of the Letter of Understanding on a temporary basis. I find no fault with your reasoning on this point as the Letter of Understanding is in itself a temporary measure designed to give relief to the men on the Sandusky District Scioto Division of the N. & W. Railway Company who have been in need of financial aid but, due to the inability of the N. & W. Railway Company being unable to get the proper Sandusky Line earnings from the P.R.R. Company, have been unable to get any financial help.

"I am still of the opinion this Letter of Understanding will accomplish this purpose.

"In your second letter, you dwell on the language of an Agreement known as Implementing Agreement 1-A. You took exception to the fact that Paragraph B of this Agreement stipulates that the so-called 'test period' was arrived by taking the total earnings of the now Sandusky District men that were actually earned by them while employed on the Sandusky Branch of the P.R.R. Company in the twelve prior months to October 16, 1964, which I feel is proper under Section 3 of the January 10, 1962, Agreement. For support of my position, I have repeatedly

quoted the language of this section of the June 10, 1962, Agreement as well as the language of the Memorandum of Understanding attached to and made a part of the January 10, 1962, Agreement. For further support, there is a letter dated April 23, 1962, from Mr. H. C. Wyatt to Vice President F. C. Montgomery wherein Mr. Wyatt clearly spells out the test period will be arrived at as it was in our Agreement of October 25, 1965. Mr. Wyatt's language, unchallenged or refuted in any way, reads, "The protection afforded these employees of the P.R.R. would be in direct ratio to service on the district in the *previous* twelve months. This would apply not only to the employees who actually rendered that service but also to a junior employe who may be displaced by reason of the senior employe electing to exercise his seniority on the other districts of the P.R.R., but again limited to the service of the senior employe during the prior twelve months.'

"Therefore, in answer to both of your letters of January 13, 1966, I must again assert that my interpretation of Section 3 of the January 10, 1962, Agreement has been arrived at by long study and by advice from the men who handled this matter before I was required to come in contact with it.

"As far as your right to appeal, I believe President C. Luna answered you in his letter of January 18, 1966.

"Sorry I cannot agree with your position in this matter.

Fraternally yours,
/s/ J. F. McNeel
General Chairman."

EXHIBIT E.

"MEMORANDUM OF UNDERSTANDING

* * * * *

PRINTER'S NOTE:

The Memorandum referred to, dated January 10, 1962, is the same as Joint Exhibit 4, *supra,* p. 77, and is here omitted to avoid duplication.

EXHIBIT F.

"February 23, 1966

"Mr. H. C. Wyatt, Senior Vice President,
Norfolk and Western Railway,
Roanoke, Virginia

"Dear Sir:

"Please refer to your letter addressed to me under date of April 23, 1962, confirming our discussions in Washington, D. C., on that date, concerning the proposed agreement for protection of employees in event of approval of merger and related applications filed by the Norfolk and Western Railway Company and other carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513 and 21514, and I would like to deal with a pertinent part of that letter found on page 3, which is identified as and titled VIII, Section 3.

"As you will recall, Vice President J. M. King accompanied me at this meeting and considerable time was spent in discussing the district from which the men who would cover the new Norfolk and Western Railway you propose to buy from the Pennsylvania Railroad, from Sandusky to Columbus, Ohio, which you advise will serve as the connecting link between the Norfolk and Western at Columbus and the Nickel Plate at Bellevue, Ohio.

"If my memory serves me correctly, you had a map of the proposed system on the wall of your private car and in discussion of the particular phase of your merger, I pointed out to you that the seniority district for these men encompassed Sandusky, Toledo and Columbus and advised, when we were talking, about how the men would make the transfer from Pennsylvania employment to N&W employment why it would be necessary to place bulletins at all three points so that the 50 senior men would have first opportunity for their job in seniority order on the Norfolk and Western.

"I am now advised that your representatives are holding that the area from Sandusky to Columbus comprises the seniority district, contrary to my understanding with you on April 23, 1962.

"I am told that the seniority district for the men who took employment with your merged railroad over the so-called Scioto Division held seniority on a common seniority roster on the Pennsylvania Railroad Toledo Division, Lake Region, and exercised seniority indiscriminately on the former Sandusky line of the Toledo Division, Toledo, Ohio-yard and road, Detroit-yard and Columbus-road, and in exercising their seniority their position on the seniority roster of this particular district was given full recognition.

"It was not my understanding, when we met in 1962, that these men would be deprived of any of the benefits contained in this protective agreement when adversely affected, but we now find that you are holding that employees from this common seniority board are being afforded protection in ratio to their earnings on the so-called Sandusky line.

"May I remind you of one point in our conversation where I advised you that it would be entirely possible that a man from Toledo who had not worked on the Sandusky line for years might, by reason of seniority, decide to assert that seniority and take employment with your company over this new Norfolk and Western Railroad and both Vice President King and I were assured these men would receive full consideration.

"It seems regrettable that an agreement which had the appearance of being one of the most outstanding merger agreements has now reached such a low point as to deprive men who could have stayed with the Pennsylvania but chose to take employment with your carrier are now being deprived of the benefits which I understood would be accruing to them in the event they asserted such prerogative.

"I will appreciate a reply from you outlining the position you now take.

"Very truly yours,

/s/ F. C. Montgomery, Vice President
Manager, Field Service Department."

Under date of May 3, 1966, Brother W. E. B. Chase addressed the following letter to General Chairman J. F. McNeel, Pennsylvania Railroad—Lines West, requesting the committee file and statement outlining the question at issue and its handling and the action taken thereon:

> "No doubt, by this time you have received your copy of a letter dated April 27, 1966, addressed to me by Brother J. E. Fitz, local chairman, Lodge 844, wherein he appeals to the Board of Appeals from the Agreement dated October 25, 1965, for the protection of employees represented by your general committee who left the employ of the Pennsylvania Railroad and accepted employment with the Norfolk and Western Railway Company effective as of October 16, 1964, the effective date of the latter's acquisition of the Sandusky Branch, Scioto Division.
>
> "Please forward me a statement in this matter on behalf of your general committee, outlining the question at issue and its handling, and the action taken thereon, as well as your committee file on the subject, furnishing all affected lodges with a copy."

On May 9, 1966, General Chairman J. F. McNeel, submitted the committee file and the following statement:

"This refers to your letter of May 3, 1966, concerning the appeal made by Brother J. E. Fitz, local chairman, Lodge 844, of the agreement of October 25, 1965, for the protection of employees represented by our general committee who left the employ of the Pennsylvania Railroad Company and accepted employment with the Norfolk and Western Railway Company, effective as of October 16, 1964, the effective date of the latter's acquisition of the Sandusky Branch, Scioto Division.

"There follows a statement outlining the question at issue and its handling as requested in your letter.

"The agreement referred to is apparently a Letter of Understanding signed by Mr. H. C. Wyatt, and me, on October 25, 1965, to afford temporary relief to certain trainmen on furlough status who had been unable to

acquire employment on the Sandusky District, Scioto Division. This letter is quoted below for your ready reference:

(The Letter of Understanding mentioned in General Chairman McNeel's letter is also Exhibit A in Local Chairman Fitz' letter of appeal and, inasmuch as it has already been quoted, it will not be repeated here.)

"In view of this, we will contain our statement and outline to the above quoted Letter of Understanding and the action leading up to its consummation.

"We have enclosed our file on this matter and when it has served its purpose, please return it to this office.

"In the file, you will find a copy of the so-called January 10, 1962, Agreement for protection of Employees.

"Your attention is directed to Section 3 of this Agreement which refers to the trainmen of the Sandusky District of the Scioto Division of the Norfolk and Western Railway Company and reads as follows:

'Section 3.

'On the effective date of the acquisition by Norfolk and Western of the Sandusky Line presently operated by the Pennsylvania Railroad, approval for which is sought in Finance Docket No. 21512, Norfolk and Western will take into its employment all employees represented by the labor organizations signatory hereto, except those on furlough or leave of absence as of the effective date of this Agreement or subsequent thereto up to and including the date the merger is consummated, who during such period have exercised employment rights on said Sandusky Line and elect to accept such employment; provided, however, that in the event two or more employees, including those on leave of absence, have employment rights to the same job, said employees will be protected hereunder and their employment preserved only to the extent of their individual equities in said job; and provided further, however, that none of

such employees shall be deprived of employment or placed in a worse position with respect to compensation at any time during such employment except that Norfolk and Western shall not be required to provide employment to any such employe during any year, commencing on the effective date of said acquisition, of greater duration than such employe enjoyed on said line in the twelve months' period immediately preceding the effective date of said acquisition. In the event any such employe elects not to accept such employment and in lieu thereof exercises employment rights on the Pennsylvania Railroad, Norfolk and Western agrees to offer employment to the employe of the Pennsylvania Railroad ultimately displaced by the return of said employe, who elects to accept such employment. Pennsylvania Railroad employees accepting such employment shall be entitled to all the protective benefits of this Section provided that Norfolk and Western shall not be required to provide employment or compensation to any such employe during any year, commencing on the effective date of such acquisition, of greater duration or amount than was performed by and paid to the Sandusky Line employe, who caused such Pennsylvania Railroad employe to be displaced, in the twelve months' period immediately preceding the effective date of said acquisition.

'Employees protected under this Section shall not be regarded as deprived of employment or placed in a worse position with respect to compensation in case of their resignation, death, retirement, dismissal for cause in accordance with existing agreements, failure to work due to disability or discipline in accordance with existing rules or agreements or furlough because of reduction in forces due to seasonal requirements as aforesaid or decline in volume of traffic or revenues.

'On the effective date of said acquisition, Norfolk and Western will take over and assume all contracts,

schedules and agreements having application on said Sandusky Line between Pennsylvania Railroad and the labor organizations signatory hereto concerning rates of pay, rules and working conditions, other than provisions therein (1) granting employees employed on said Line seniority or employments rights beyond said Line and (2) granting seniority or employments rights on said Line to employees having employment rights beyond said Line, in effect at the time of acquisition of said Sandusky Line and will be bound by the terms and provisions thereof subject to changes in accordance with the provisions of the Railway Labor Act, as amended, in the same manner and to the same extent as if Norfolk and Western had been a party thereto.

'In the event the Commission approves the acquisition by the Norfolk and Western of trackage rights of 2.9 miles over certain lines of the Connecting Railway Company, now operated by the Pennsylvania Railroad Company, authority for which is sought as a part of Finance Docket No. 21512, then, upon consummation thereof, the provisions of the Washington Job Protection Agreement of 1936 will be applied for the protection of all employees of the Pennsylvania Railroad Company represented by the labor organizations parties hereto who may be adversely affected as a result of such acquisition of trackage rights by Norfolk and Western with respect to their rates of pay, rules or working conditions or rights or privileges pertaining thereto.

'It is further agreed that Section 1(d) herein shall be applicable to the provisions contained in this Section.'

"From the language in this Agreement, it can be clearly adduced that the trainmen who formerly worked on the Pennsylvania Railroad and exercised their option to transfer to the Norfolk and Western Railway Company are entitled, for the purpose of determining the amount

of 'Certified Test Period Earnings,' only to the amount of monies earned on the Sandusky District during the twelve (12) months immediately preceding the effective date of the merger of the N&W-NKP-Wabash and the purchase of the Pennsylvania Railroad Sandusky Line which date was October 16, 1964.

"This can be further substantiated in a letter from Mr. H. C. Wyatt, Senior Vice President, Norfolk and Western Railway Company, to Brother F. C. Montgomery, Vice President, Brotherhood of Railroad Trainmen, dated April 23, 1962, which reads in part as follows: 'The protection afforded these employees of the Pennsylvania Railroad would be in direct ratio to the service on the district in the previous 12 months.'

"The next item in our file is a copy of a letter of Mr. W. A. Noell, Regional Manager, Norfolk and Western Railway Company addressed to All Engineers, Firemen and Trainmen on the Toledo Division and the Yard Conductors and Brakemen in the Sandusky, Toledo and Detroit Yards. In this letter, Mr. Noell outlines the initial operation of the trains programmed on the Sandusky District, Scioto Division, Norfolk and Western Railway Company and, in addition, Mr. Noell explained to all the affected men their right to transfer to the Norfolk and Western Railway Company and specified that they would be transferring under the provisions of Section 3 of the January 10, 1962, Agreement. On the bottom of this letter is a space to be detached and sent to Mr. Noell wherein the men who elected to transfer to the Norfolk and Western exercised this right and by their signatures agreed to transfer under Section 3 of the January 10, 1962, Agreement. Mr. Fitz, the appellant in this case, signed one of these form letters and therefore agreed to transfer to the Norfolk and Western under Section 3 of the January 10, 1962, Agreement.

"Next in the file on this matter is a Letter of Understanding signed October 9, 1964, by the general chairman of the Engineers, Firemen and Brotherhood of Railroad Trainmen which provides for the orderly transition of the eligible employees who had elected to transfer to the

Norfolk and Western Railway Company and again it is clearly spelled out that they have transferred under Section 3 of the January 10, 1962, Agreement. .

"On July 13, 1965, reasoning that more than a reasonable time had elapsed to enable the Norfolk and Western Railway Company to arrive at the proper figures to be used for the Sandusky trainmen under Section 3, we wrote to Mr. Frank Johnson, Manager-Personnel, Norfolk and Western Railway Company, who had, at that time been designated to handle this, urging him to complete the Test Period Earnings List without further delay. Mr. Johnson answered our letter advising us that the Norfolk and Western Railway Company still did not have the Sandusky Earnings separated and when the correct figures were available, he would advise us.

"Again, on September 3, 1965, having had no further word from Mr. Johnson on this subject, we again wrote to him and advised him that we had no alternative but to invoke Section 1(d) of the January 10, 1962, Agreement which reads as follows:

'Section 1(d).

'For purposes of this Agreement, Section 13 of the Washington Job Protection Agreement is deleted and the following provision inserted in lieu thereof:

"In the event any dispute or controversy arises between Norfolk and Western and any labor organization signatory to this Agreement with respect to the interpretation or application of any provision of this Agreement or of the Washington Job Protection Agreement (except as defined in Section 11 thereof) or of any implementing agreement entered into between Norfolk and Western and individual organizations which are parties hereto pertaining to the said merger or related transactions, which cannot be settled by Norfolk and Western and the labor organization or organizations involved within thirty days after the dispute arises, such dispute may be referred by either party to an arbitration committee for consideration and determination.

> Upon notice in writing served by one party on the other of intent by that party to refer the dispute or controversy to an arbitration committee, each party shall, within ten days, select one member of the arbitration committee and the two members thus chosen shall endeavor to select a third member who shall serve as chairman, in which event the compensation and expenses of the chairman shall be borne equally by the parties to the proceeding.
>
> "All other expenses shall be borne by the party incurring them. Should the two members be unable to agree upon the appointment of the third member within ten days, either party may request the National Mediation Board to appoint the third member, whose compensation and expenses shall then be paid in accordance with existing law. The decision of the majority of the arbitration committee shall be final and binding." '

"On October 5, 1965, with still no word from Mr. Johnson, we wrote to President C. Luna outlining our problem in this matter, advising him of our desire to invoke Section 1(d) and requesting that Brother J. M. King, Vice President, Brotherhood of Railroad Trainmen, be assigned as our member of the Arbitration Committee.

"In a letter dated October 7, 1965, President C. Luna agreed with our opinion and suggested the proper measures to take to bring this matter to Arbitration as provided in Section 1(d) above quoted.

"In a letter dated October 8, 1965, we wrote to Mr. H. C. Wyatt in compliance with Brother C. Luna's instructions. Mr. Wyatt, Senior Vice President, Norfolk and Western Railway Company answered our letter and notified us that Mr. Frank Johnson would be their member of the Arbitration Committee.

"Before this matter could be brought to arbitration, a conference was arranged in Mr. Johnson's office in Cleveland and Implementing Agreement 1-A was signed as well as the Letter of Understanding which is herein being appealed.

"Upon receipt of the Earnings Sheets furnished the Norfolk and Western Railway Company by the Pennsylvania Railroad Company, we compiled separate Earnings Sheets using 75% of each man's total earnings on the Pennsylvania Railroad Company in the twelve months prior to the effective date of the merger and purchase. All of this information was then furnished to the interested local chairmen and lodge secretaries with the explanation that this was only a temporary understanding and was made in order to help the Sandusky trainmen who were in immediate need of funds due to being on furlough status.

"We reasoned that the trainmen presently working on this district were generally earning in excess of their Certified Protection Earnings and were in no need of financial assistance.

"As a result of this conference and agreement, we withdrew our letter to invoke Section 1(d) by letter to Mr. Wyatt dated October 26, 1965.

"Brother J. E. Fitz wrote this office a letter dated January 13, 1966, expressing his opinion of the Letter of Understanding and accepting it on a temporary basis, retaining his right to appeal at some future date. This letter was addressed jointly to President C. Luna and the undersigned.

"On January 18, 1966, Brother Luna answered Brother Fitz.

"On January 24, 1966, we answered Brother Fitz and gave him our reasons for signing the Letter of Understanding.

"By letter dated January 31, 1966, Mr. Wyatt informed us that Mr. Fred Yancey has been assigned to this matter and that he would have Mr. Yancey meet with us in Columbus, Ohio, to consider the claims for Protective Allowance which had been submitted by the Sandusky District Trainmen under the terms of the Letter of Understanding of October 25, 1965.

"This meeting was held on March 31, 1966, at which time Local Chairman J. E. Fitz, Lodge 844, and Local Chairman C. R. Mick, Lodge 141, were present.

"At this meeting, we arrived at settlement of claims amounting to a total of $26,963.96.

"On April 7, 1966, Mr. Wyatt informed us that he was agreeable to paying these claims in accordance with the understanding of the Letter of October 25, 1965, and with the realization that this settlement would be without prejudice to our respective positions on these and other claims.

"We replied to Mr. Wyatt by letter dated April 11, 1966, and clearly set forth our position on these claims.

"Realizing that this matter is far from solved, we wrote Brother J. M. King this same date requesting that he meet with us to discuss this matter with the thought that such a meeting would be of great help in devising a method to pursue in order to arrive at a final fair settlement of this problem. Due to Brother King's other duties, this meeting has never been held.

"In summary, we see nothing in our actions which have not been handled in accordance with the provisions of the January 10, 1962, Agreement and feel that if the appeal of Brother Fitz is upheld, it will only further confuse the situation because a withdrawal on our part at this particular time would prevent the payment of the above mentioned $26,963.96 which we have agreed to accept.

"I trust the above statement is that sought by you in your letter of May 3, 1966."

Appearances

Brothers P. V. Hemmer, Secretary, General Grievance Committee, Pennsylvania Railroad, and J. E. Fitz, Local Chairman, Lodge 844, appeared before the Board and testified in connection with this appeal July 21, 1966.

Findings of the Board:

The records in connection with this case disclose that the Norfolk and Western Railway Company sent a letter via U. S. Mail to the conductors and trainmen holding seniority on the former Sandusky Branch of the Pennsylvania Railroad reading as follows:

"NORFOLK AND WESTERN RAILWAY COMPANY

Columbus, Ohio
September 30, 1964

"Engineers, Firemen, Conductors and Trainmen on Toledo Division—Yard Conductors and Yard Brakemen on Sandusky, Toledo and Detroit Yards.

"Effective October 16, 1964, or as soon thereafter as practicable, the Norfolk and Western Railway Company will purchase the Sandusky Line and proposes to establish the following runs on that line:

Two turnaround runs between Columbus and Bellevue, operating out of Columbus.

Two local runs operating between Columbus and Sandusky, making a one-way trip on alternate days.

One turnaround run between Sandusky and Bucyrus, operating out of Sandusky,

3 assigned yard runs and one relief at Sandusky.

Runs will be added or taken off as necessary to handle the business.

"To man the above runs, the Norfolk and Western Railway Company hereby offers to take into its employment employes of the Pennsylvania Railroad who are eligible under the terms and provisions of Section 3 of the 'Agreement for protection of employees in event of approval of merger and related applications filed by the Norfolk and Western Railway and other carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513, and 21514.' dated January 10, 1962, and who elect to accept such employment under the terms and provisions of Section 3 of the above agreement.

"Election must be made on the form attached hereto and be mailed or delivered to Mr. W. A. Noell, Regional Manager, Western Region, Norfolk and Western Railway Company, in care of the office of the Superintendent Personnel, Pennsylvania Railroad, Union Station, Columbus, Ohio, on or before 12:01 a.m., October 16, 1964.

"Copy of Section 3 of the 'Agreement for Protection of Employees in Event of Approval of Merger and Related Applications Filed by Norfolk and Western Railway Com-

pany and Other Carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513 and 21514.' dated January 10, 1962, and copy of brief outline of initial changes in operation on Sandusky Line, are attached for your information.

/s/ W. A. Noell
W. A. Noell
Regional Manager
Western Region
Norfolk and Western Railway Co.

(Detach this form on Dotted Line)

"Mr. W. A. Noell, Regional Manager, Western Region
Norfolk and Western Railway Company
c/o Office of the Superintendent Personnel
Pennsylvania Railroad
Union Station
Columbus, Ohio

"I, _____, elect to accept employment with the Norfolk and Western Railway Company under the terms and provisions of Section 3 of the 'Agreement for Protection of Employees in Event of Approval of Merger and Related Applications Filed by Norfolk and Western Railway Company and Other Carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513, and 21514.' dated January 10, 1962.

"I, _____, decline the offer of employment by the Norfolk and Western Railway Company under the terms and provisions of Section 3 of the above agreement.

(Signed) _____
Date _____ (Title) _____
(Location) _____"

The so-called Sandusky Branch is a line of railroad extending from Sandusky in the north, southward to Columbus, Ohio, that was purchased by the Norfolk and Western Railway to form a physical link with their rail-

way proper and the newly merged property of the Nickel Plate Railroad.

Ninety six trainmen, formerly with the Pennsylvania Railroad, elected to accept employment on the N&W in accordance with the several agreements between the carrier and the Brotherhood, notably one agreement dated October 9, 1964, reproduced below:

"MEMORANDUM OF UNDERSTANDING

* * * * *

PRINTER'S NOTE:

The Memorandum referred to, dated October 9, 1964, is the same as Joint Exhibit 7, *supra*, p. 81, and is here omitted to avoid duplication.

A number of the trainmen who elected employment with the N&W while on furlough due to lack of work, were in dire need of funds and by way of finding some relief for these brothers, General Chairman J. F. McNeel took steps to invoke the arbitration feature of Section 1 (d) to force the carrier to take the necessary action to fulfill the requirements of Section 3 of the "Agreement for Protection of Employees in Event of Approval of Merger and Related Applications filed by Norfolk and Western Railway Company in I.C.C. Finance Dockets 21510, 21511, 21512, 21513 and 21514." which provides for test periods to determine the average monthly compensation of employees who transferred to the Norfolk and Western Railway Company who were adversely affected. Just before the question was to be handled in arbitration, the so-called agreement that is named in this appeal was consummated. It is self-explanatory and appears hereinbefore in this document as Exhibit A.

Oral argument was heard by the Board in Cleveland, Ohio, July 21, 1965. Shortly thereafter, the appellant submitted the following letter to the General Secretary and Treasurer:

"This letter is in reference to an appeal heard at Grand Lodge July 21, 1966, concerning the Agreement of October

25, 1965, covering adversely affected payments to the brothers of Lodges 141 and 844.

"There developed, in the process of the hearing, some information which I previously was unaware of; namely, that Implementing Agreement 1-A was signed and agreed to by the principals involved. This could have been unknown to me because of the transition in the office of local chairman, or to misunderstanding or negligence on my part. The reasons here are unimportant. The important thing is I know now this is an agreement and we are praying for relief from this agreement also because without this relief there can be no purpose or meaning to the entire appeal.

"I was laboring under the erroneous illusion the 'Letter of Understanding' was all that was agreed to between the parties and Implementing Agreement 1-A would not be signed until the breakdown of the so-called Sandusky Line earnings was available. The copy I have on file is a photostat (which I am furnishing) without date or signatures reproduced, also the heading implies it would be an agreement between all the operating Brotherhoods involved, this being one of the reasons I assumed it was not an agreement yet as the BLF&E representative at Sandusky is reasonably sure they are not a party to this agreement at this time. Further, Brother McNeel has made repeated reference to invoking Section 1 (d) of the January 10, 1962, Agreement, which also lead me to believe this was not yet an agreement.

"The brothers of Lodge 844 cannot accept this as a final and binding settlement as this agreement (1-A) is spiced with much reference to the 'Sandusky District' and the test period being 'October, 1963 to October, 1964' contrary to the Memorandum of Understanding, attached to and made a part of the January 10, 1962 (I.C.C. F. D. 21512) Agreement. We take particular exception to Section One (1), Paragraphs (a) and (b).

"This letter is meant as a clarification of my position but can in no way alter the facts, and was not meant to, as presented to the distinguished Board, in my oral arguments on July 21, 1966. However, in my original letter

requesting an appeal on April 27, 1966, I am of the opinion, by the wording embodied, you brothers could properly consider Implementing Agreement 1-A being appealed as well as the 'Letter of Understanding' and I will quote this wording for your ready reference:

> 'We, the members of Lodge 844, are petitioning and praying for relief from *the Agreement of October 24, 1965,* consummated between the N&W Railroad and the general chairman, Brother J. F. McNeel, concerning the protection and adversely affected payments to be allowed to the brothers employed on the Sandusky Branch, Scioto Division, Norfolk and Western Railroad. We are also petitioning the Board of Appeals to submit this entire matter to arbitration in compliance with I.C.C. Finance Dockets 21510 thru 21514.'

"If you find this issue could not be properly considered at this time, I would appreciate being apprised of the fact immediately in order that I may properly submit this matter to the Board of Appeals in compliance with Rule 13 of our Constitution.

> "Thank you in advance for your cooperation in this matter."

The following letter, in reply, is self-explanatory:

> "I am in receipt of your letter dated July 25, 1966, with enclosures, relative to your appeal to the Board of Appeals, from agreement of October 25, 1965, for protection of employees who left employment of PRR and accepted employment with the N&W effective October 16, 1965, which was considered in this headquarters July 21, 1966.
>
> "The additional information furnished is being referred to the Board of Appeals and I trust it will be given full consideration when that board releases its decision."

Among other things, the appellant contends the so-called agreement known as Exhibit A, while temporary, is a violation of the provisions of Section 3 of the I.C.C.

Finance Docket 21512. It is his position, although stated in very general terms, that a letter signed by a vice president of the carrier has no authority to override or abrogate an I.C.C. order. He further contends the Memorandum of Understanding attached to and made a part of the several I.C.C. dockets were utterly disregarded (see Exhibit E). He goes on further to say that Section 3 of Docket 21512 cannot be applied in determining the test period and that the Memorandum of Understanding of the same date as the aforementioned dockets supersedes all existing agreements (Exhibit E).

On the other hand, Brother P. V. Hemmer, Secretary, General Grievance Committee, in defending the agreement under appeal, points out that the need of the furloughed men for money was the motivating influence that caused Brother McNeel to try to persuade the carrier to give temporary help to these brothers pending final disposition of their monetary entitlements which final settlement, at that time, appeared to be subject to prolonged delay. It was the position of Brother Hemmer that the Letter of Understanding of October 25, 1966, between Brother McNeel and Mr. Wyatt, the senior vice president of the carrier, did no more than give an advance of 75% of the monies that were due them because the final total amount was, as yet, undetermined.

In the summary of General Chairman J. F. McNeel, he states there was nothing in his action which had not been handled in accordance with the January 10, 1962 Agreement.

The Board has carefully considered all the documentary evidence submitted to us for our study as well as the transcript of the oral testimony taken at the time of hearing and we are of the following opinion:

Many of the questions raised by the appellant in support of his position in the instant appeal are similar in nature to those used by the appellants in Board of Appeals Case No. 3705 released in August, 1965. In Case 3705, Brother Fitz was one of the appellants. In his submission in 3705, page 138, third paragraph, Brother Fitz brings up the question of lost protection money and he states

in part, "* * * and it is in this section (3) the trainmen of Lodge 844 lose their protection money, by disallowing wages paid these trainmen while protecting their seniority at Toledo, Ohio * * *."

In Case 3705, page 144, the Board said in reply, "The matter of protection money is of no moment in this case before us as this subject was disposed of in the agreement signed by the carrier and the Brotherhood chiefs effective January 10, 1962, and the accompanying Memorandum of Understanding in connection therewith of the same date."

We feel that the above effectively answers the latest contention of the appellant in this instant case concerning the method of arriving at the test period and the average monthly compensation as these very items are spelled out in the memorandum cited above.

Section 3 of title VIII of the "Agreement Effective January 10, 1962, and Attached Memoranda of Understanding For Protection of Employees in Event of Approval of Merger and Related Applications Filed by Norfolk and Western Railway Company and Other Carriers in I.C.C. Finance Dockets Nos. 21510, 21511, 21512, 21513 and 21514," known as Exhibits "B" and "E," among other things, provides for employment or compensation to protected or adversely affected employees but with certain strings attached, to wit: "* * * Norfolk and Western shall not be required to provide employment or compensation to any such employe during any year, commencing on the effective date of such acquisition, of greater duration or amount than was performed by and paid for to the Sandusky Line employe * * *."

The correspondence known as Exhibit "D" is a letter appearing hereinbefore in this document and it definitely shows that the appellant was perfectly aware that there was a document known as Implementing Agreement 1-A previous to the appeal although he disclaims this knowledge until after he attended oral hearing in this case, yet the appellant submitted Exhibit "D" to the Board as a part of his appeal.

The files are replete with allusions to the protection afforded adversely affected employees, especially enlight-

ening is the correspondence on this and other matters between Vice President F. C. Montgomery for the Brotherhood and Senior Vice President H. C. Wyatt of the Norfolk and Western Railway and they are in agreement that the pattern for "test period" and "average monthly compensation" was set in Section 3 of the document known as Exhibits "B" and "E."

The appellant, in his appeal, makes the following plea: "We are also petitioning the Board of Appeals to submit this entire matter, (to) arbitration in compliance with I.C.C. Finance Dockets 21510 thru 21514."

This is a most peculiar request. The only thing we can make out of this is that this request is motivated by a desire to exhaust every avenue of appeal regardless of the validity of the contentions. Evidently, he has reference to Section 1 (d) of Exhibit "B," however, his interpretation of this section is open to question.

Section 1 (d) provides for arbitration only in the event the carrier or any of the signatory organizations are at odds or disagreement. In the instant case, there is no such disagreement between our Brotherhood and Norfolk and Western. The only disagreement we can see in this case is that of the appellant with the efforts of the representatives of the Brotherhood in their implementing and complementing the already existing guide lines established in Exhibits "B" and "E."

Still to be resolved is the propriety of the Letter of Understanding of October 25, 1965. If Section 3 of the January 10, 1962, Agreement is controlling in the instant case, and we believe it is, then there is nothing wrong with the Letter of Understanding. It does not conflict in any way with the controlling docket which spells out the protection features of adversely affected employees because the "Understanding" merely provides for monetary help for the distressed membership of up to 75% of their entitlement pending the certification and payment of the final figures in full settlement.

In the letter and attachments submitted to us after the oral hearings was concluded, we can find no fresh

evidence or argument that was not thoroughly explored during the hearing. We do note, as a final plea, the appellant requests relief from Implementing Agreement "1-A."

The Board finds no merit in this latest thesis of the appellant. We are convinced that no valid reasons have been put forth that would warrant the setting aside of either the Implementing Agreement "1-A" or the Letter of Understanding of October 25, 1965, under appeal.

We believe that General Chairman J. F. McNeel's actions in the instant case are right, proper and just and in conformity with the controlling I.C.C. Dockets that appear in Exhibits "B" and "E." Consequently, the appeal is denied.

DECISION:

Appeal Denied.

* * * * *

(Signatures Illegible.)

DEFENDANT'S EXHIBIT T.

Letter, March 3, 1967, Vice President-Personnel to J. F. McNeel.

Merger claims of various Sandusky District Conductors and Brakemen for the period October 16, 1964, through the month of September, 1966—

March 3, 1967

File: X-865-S-T

Mr. J. F. McNeel, General Chairman,
Brotherhood of Railroad Trainmen,
Room 209, 683 East Broad Street,
Columbus 13, Ohio.

Dear Sir:

Please refer to our conference on February 20, 1967, at which were also present Messrs. J. E. Fitz and C. R. Mick of your Committee, when the claims of various Sandusky District Conductors and Brakemen, allegedly ad-

versely affected by the merger for the period October 16, 1964, through the month of September, 1966, under the provisions of Section 3 of the Agreement of January 10, 1962, were reconsidered in the light of the adjusted "Test Periods" as agreed to.

We agreed to dispose of these claims as tabulated on Attachments "A," "B" and "C" herewith.

Attachment "A" covers the net amount due thirteen employes for the period October 16, 1964, through November, 1965, after deducting amount paid as tabulated in our letter of April 7, 1966.

Attachment "B" indicates the amount due twenty-six employes for the period October 16, 1964, through November, 1965, who did not receive any payment in the settlement of April 7, 1966.

Attachment "C" shows the adjusted amount of overpayment made to twenty-five employes on April 7, 1966, under letter agreement of October 25, 1965.

It was understood and agreed that all subsequent claims would be filed under existing agreements within thirty days following the end of the month involved.

The claims of Brakemen R. N. Nemitz and B. L. Hannah; also former employes H. E. Reeves and L. E. Billitter are being held in abeyance for further information and consideration.

Yours truly,

Vice President-Personnel.

B/C
WCS
HJB—This matter was discussed with representatives from your Department on date of conference. Several copies of attachment to our letter of April 7,
RCW 1966, as well as letter agreement dated October 25, 1965, (which among other things provide for a monthly deduction of $20.00 until total overpayment is withheld) are enclosed. Please arrange handling in line with understandings reached in conference on February 20, 1967. W. A. N.

DEFENDANT'S EXHIBIT U.

Letter, April 3, 1967, Vice President-Personnel to J. F. McNeel.

Merger claims of various Sandusky District Conductors and Brakemen for the period December, 1965, through September, 1966—

April 3, 1967
File: X-865-S-T

Mr. J. F. McNeel, General Chairman,
Brotherhood of Railroad Trainmen,
Room 209, 683 East Broad Street,
Columbus 13, Ohio.

Dear Sir:

Please again refer to our conference on February 20, 1967, at which were also present Messrs. J. E. Fitz and C. R. Mick of your Committee, when the claims of various Sandusky District Conductors and Brakemen, allegedly adversely affected by the merger for the period October 16, 1964, through the month of September, 1966, under the provisions of Section 3 of the Agreement of January 10, 1962, were reconsidered in the light of the adjusted "Test Period" as agreed to.

In our letter dated March 3, 1967, we disposed of the majority of these claims through the month of November, 1965.

I now attach statement showing additional amounts due thirty-one Sandusky District Conductors and Brakeman for the period December, 1965, through September, 1966.

Yours truly,

Vice President-Personnel.

B/C
EWN
HJB

RCW—Please arrange payment as soon as practicable, advising payroll period on which allowed.

W. A. N.

DEFENDANT'S EXHIBITS 1, 1A, AND 1B TO NOELL DEPOSITION.

Letter, September 30, 1964, W. A. Noell to Sandusky Line Employees and Attachments.

Noell Exhibit No. 1.

NORFOLK AND WESTERN RAILWAY COMPANY

Columbus, Ohio

September 30, 1964

Engineers, Firemen, Conductors and Trainmen on Toledo Division—

Yard Conductors and Yard Brakemen on Sandusky, Toledo and Detroit Yards—

Effective October 16, 1964, or as soon thereafter as practicable, the Norfolk and Western Railway Company will purchase the Sandusky Line and proposes to establish the following runs on that line:

Two turnaround runs between Columbus and Bellevue, operating out of Columbus.

Two Local runs operating between Columbus and Sandusky, making a one-way trip on alternate days.

On turnaround run between Sandusky and Bucyrus, operating out of Sandusky,

3 assigned yard runs and one relief at Sandusky.

Runs will be added or taken off as necessary to handle the business.

To man the above runs, the Norfolk and Western Railway Company hereby offers to take into its employment employees of the Pennsylvania Railroad who are eligible under the terms and provisions of Section 3 of the "Agreement for Protection of Employees in Event of Approval of Merger and Related Applications Filed by the Norfolk and Western Railway Company and Other Carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513, and 21514." dated January 10, 1962, and who elect to ac-

cept such employment under the terms and provisions of Section 3 of the above agreement.

Election must be made on the form attached hereto and be mailed or delivered to Mr. W. A. Noell, Regional Manager, Western Region, Norfolk and Western Railway Company, in care of the Office of the Superintendent Personnel, Pennsylvania Railroad, Union Station, Columbus, Ohio, on or before 12:01 AM, October 16, 1964.

Copy of Section 3 of the "Agreement for Protection of Employees in Event of Approval of Merger and Related Applications Filed by Norfolk and Western Railway Company and Other Carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513 and 21514." dated January 10, 1962, and copy of brief outline of initial changes in operation on Sandusky Line, are attached for your information.

W. A. Noell
Regional Manager
Western Region
Norfolk and Western Railway Co.

(Detach this form on Dotted Line)

Mr. W. A. Noell, Regional Manager, Western Region
Norfolk and Western Railway Company
c/o Office of the Superintendent Personnel
Pennsylvania Railroad
Union Station
Columbus, Ohio

I, _____; elect to accept employment with the Norfolk and Western Railway Company under the terms and provisions of Section 3 of the "Agreement for Protection of Employees in Event of Approval of Merger and Related Applications Filed by Norfolk and Western Railway Company and Other Carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513, and 21514." dated January 10, 1962.

I, _____, decline the offer of employment by the Norfolk and Western Railway Company under the terms and provisions of Section 3 of the above agreement.

(Signed) _____
(Title) _____

Date _____

Noell Exhibit 1A.

effective October 16, 1964, or as soon thereafter as practicable:

Norfolk and Western will purchase the Sandusky line, extending from Hudson Street, Columbus, Ohio, to Sandusky, Ohio, including the yard and coal piers at Sandusky, and will be granted trackage rights over two tracks between Hudson Street and a point a short distance east of the CA&C crossing at Columbus, and will purchase two tracks designated Nos. 73 and 74 in Pennor Yard, which will provide an eastward and westward main track for movement of N&W trains through these yards to and from the Sandusky line. In addition, tracks designated as Nos. 71 and 72 in Pennor Yard, will also be purchased by the Norfolk and Western. PRR will be granted trackage rights over the Sandusky line between Hudson Street and Carrothers. All of this trackage, including the line to Sandusky, will become a part of N&W's Scioto Division.

A modern traffic control system of signaling will be installed on tracks Nos. 73 and 74 through Pennor and Grogan yards and on to Bayside Yard at Sandusky, Ohio. The controls for the new signaling system will be placed in the dispatcher's office at Portsmouth, Ohio. Control of the signals and switches from the dispatcher's office will ultimately result in discontinuing some or all of the block stations on the Sandusky line.

Track on the Sandusky line will be upgraded for high speed operation. Connection will be installed at Bellevue, Ohio, between the Sandusky line and present Nickel Plate's W&LE District to permit train movements to and from Toledo, and between present Nickel Plate's line at

the east end of Bellevue yard and the Sandusky line to permit movement of trains between the yard and the Sandusky line. Connection will also be installed between the Sandusky line and present Nickel Plate's line at Sandusky to permit operation of trains between present Nickel Plate's Fremont-Fostoria line and the merged line's Sandusky (Bayside) yard, where trains from and to the Fremont-Fostoria line will be yarded and dispatched.

Operation of one westbound and two eastbound through freight trains will be established, to be manned by crews in turnaround service between Columbus and Bellevue. When the volume of traffic justifies, these runs will be extended to operate between Columbus and Toledo by utilizing present Nickel Plate trackage between Bellevue and Toledo. Coal trains will be operated from Columbus either to Toledo or to Sandusky, or in turnaround service between Columbus and points short of Toledo or Sandusky. All crews will set off or pick up at intermediate points, as directed.

Local freight service will be performed as required between Columbus and Sandusky.

Coal now moving via present NKP line to Huron, O., for dumping into vessels will be moved to Sandusky, O., for dumping along with other coal at that point. Coal moving from Brewster destined Sandusky for dumping into Lake vessels will be moved (1) by Toledo crews out of Brewster, who will set the cars off at Bellevue for picking up by Sandusky line crews, or for picking up by turn crews operating between Sandusky and points on the Sandusky line, or (2) by crews out of Brewster moving to Hartland, Huron, Bellevue or to Sandusky. When moving to either Sandusky or Toledo, Brewster crews will, when directed, pick up or set off cars at intermediate points on the going trip, as well as on the return trip.

N&W trains from and to the Sandusky line will be yarded and dispatched from any point within N&W's Columbus terminal.

It is contemplated that PRR yard crews at Columbus will continue to serve the industries just north of Hudson

Street now served by them and N&W yard crews will continue to serve the industries now served by N&W yard crews.

Noell Exhibit 1B.

FOR PROTECTION OF EMPLOYEES IN EVENT OF APPROVAL OF MERGER AND RELATED APPLICATIONS FILED BY NORFOLK AND WESTERN RAILWAY COMPANY AND OTHER CARRIERS IN I.C.C. FINANCE DOCKET NOS. 21510, 21511, 21512, 21513, and 21514

Section 3.

On the effective date of the acquisition by Norfolk & Western of the Sandusky Line presently operated by the Pennsylvania Railroad, approval for which is sought in Finance Docket No. 21512, Norfolk & Western will take into its employment all employees represented by the labor organizations signatory hereto, except those on furlough or leave of absence as of the effective date of this Agreement or subsequent thereto up to and including the date the merger is consummated, who during such period have exercised employment rights on said Sandusky Line and elect to accept such employment; provided, however, that in the event two or more employees, including those on leave of absence, have employment rights to the same job, said employees will be protected hereunder and their employment preserved only to the extent of their individual equities in said job; and provided further, however, that none of such employees shall be deprived of employment or placed in a worse position with respect to compensation at any time during such employment except that Norfolk & Western shall not be required to provide employment to any such employee during any year, commencing on the effective date of said acquisition, of greater duration than such employee enjoyed on said line in the twelve months' period immediately preceding the effective date of said acquisition. In the event any such employee elects not to accept such employment and in lieu thereof exercises employment rights on the Pennsylvania Railroad,

Norfolk & Western agrees to offer employment to the employee of the Pennsylvania Railroad ultimately displaced by the return of said employee, who elects to accept such employment. Pennsylvania Railroad employees accepting such employment shall be entitled to all the protective benefits of this Section provided that Norfolk & Western shall not be required to provide employment or compensation to any such employee during any year, commencing on the effective date of such acquisition, of greater duration or amount than was performed by and paid to the Sandusky Line employee, who caused such Pennsylvania Railroad employee to be displaced, in the twelve months' period immediately preceding the effective date of said acquisition.

Employees protected under this Section shall not be regarded as deprived of employment or placed in a worse position with respect to compensation in case of their resignation, death, retirement, dismissal for cause in accordance with existing agreements, failure to work due to disability or discipline in accordance with existing rules or agreements or furlough because of reduction in forces due to seasonal requirements as aforesaid or decline in volume of traffic or revenues.

On the effective date of said acquisition, Norfolk & Western will take over and assume all contracts, schedules and agreements having application on said Sandusky Line between Pennsylvania Railroad and the labor organizations signatory hereto concerning rates of pay, rules and working conditions, other than provisions therein (1) granting employees employed on said Line seniority or employment rights beyond said Line and (2) granting seniority or employment rights on said Line to employees having employment rights beyond said Line, in effect at the time of acquisition of said Sandusky Line and will be bound by the terms and provisions thereof subject to changes in accordance with the provisions of the Railway Labor Act, as amended, in the same manner and to the same extent as if Norfolk & Western had been a party thereto.

In the event the Commission approves the acquisition by the Norfolk & Western of trackage rights of 2.9 miles over certain lines of The Connecting Railway Company, now operated by the Pennsylvania Railroad Company, authority for which is sought as a part of Finance Docket No. 21512, then, upon consummation thereof, the provisions of the Washington Job Protection Agreement of 1936 will be applied for the protection of all employees of The Pennsylvania Railroad Company represented by the labor organizations parties hereto who may be adversely affected as a result of such acquisition of trackage rights by Norfolk & Western with respect to their rates of pay, rules or working conditions or rights or privileges pertaining thereto.

It is further agreed that Section 1(d) herein shall be applicable to the provisions contained in this Section.

DEFENDANT'S EXHIBIT 2 TO NOELL DEPOSITION.

Letter, October 19, 1966, Vice President-Personnel to J. F. McNeel.

"Test Period" for Sandusky District Conductors and Brakemen—

October 19, 1966
File: X-865-S-T

Mr. J. F. McNeel, General Chairman,
Brotherhood of Railroad Trainmen,
683 East Broad Street,
Columbus, Ohio 43215.

Dear Sir:

Please refer to your letter of October 12, 1966, above subject:

You will find enclosed "Attachment No. 1" which shows the total amount of earnings as reported by the Pennsylvania Railroad in March, 1965, for the period twelve months prior to October 16, 1964, escalated by

seven percent for the period June 1, 1964, through October 15, 1964, and the "Test Period" amount for the forty-five Trainmen who were assigned exclusively to the Sandusky District during this twelve months period.

"Attachment No. 2" shows only the amount of earnings made by the balance of these employees while assigned out of Sandusky or Columbus, prorated on a calendar day basis as obtained from the crew assignment records on file in the Pennsylvania Railroad offices at Toledo, Ohio, a copy of which has already been furnished you. These figures and the resultant "Test Periods" also include the wage increase as calculated in "Attachment No. 1."

Please advise if these "Test Periods" as shown on the two attachments now meet with your approval.

Yours truly,

Vice President-Personnel.

B/C
HJBrinner.

DEFENDANT'S EXHIBIT 3 TO NOELL DEPOSITION.

Letter, October 25, 1966, J. F. McNeel to W. A. Noell.

GENERAL GRIEVANCE COMMITTEE
BROTHERHOOD OF RAILROAD TRAINMEN

October 25, 1966

Mr. W. A. Noell
Vice-President—Personnel
Norfolk and Western Railway Company
Roanoke, Virginia 24011

Re: Test Period Earnings
Sandusky Conductors and Trainmen

Dear Sir:

This refers to your letter of October 19, 1966 on the above subject. We have checked both Attachments Nos. 1 and 2 against our figures and find them to be correct, with the following exceptions.

On Attachment No. 1—Mr. C. R. Mick should have the amount of $48.65 added to his total twelve (12) months test period earnings.

Mr. R. S. Shilling should have the amount of $121.43 added to his total twelve (12) months test period earnings.

On Attachment No. 2 Mr. W. L. Butler should have the amount of $97.30 added to his total twelve (12) months test period earnings.

Mr. Mick lost time in Brotherhood service on October 5, and 6, 1964 and is entitled to 1.2 x the local conductor's rate of $20.27.

Mr. Butler, former Local Chairman, lost time in Brotherhood work on the dates of June 9 and 10, September 24 and October 6, 1964, a total of four (4) days or 1.2 x $20.27 x 4.

Mr. Shilling, former Local Chairman at Columbus, lost time in Brotherhood work on the following dates. June 10, 1964, September 9, 10, 23, 24, 1964 a total of five (5) days x $19.84 x 1.2.

Please consider this as certification of the time lost by the trainmen in accordance with Implementing Agreement 1-A, Section 2, dated October 25, 1965.

On Attachment No. 2 you have given Mr. A. F. Strack, Jr.—a lesser amount than was agreed upon for him in a letter dated October 25, 1965, signed by Mr. Frank Johnson and me, a copy of which is attached.

On Attachment No. 1—we are still of the opinion that Mr. Wake and Mr. Robinson should have that portion of their injury settlements, which was considered lost time, added to their twelve (12) months total protective earnings.

If you are willing to add the earnings for time lost in Brotherhood service for the Local Chairmen listed above and abide by the Letter of Understanding concerning Mr. Strack, we are willing to accept the figures in your letter of October 19, 1966 as final, with the exception of the figures for Mr. Robinson and Mr. Wake.

We would like to further discuss these two men's protective earnings figures.

Yours very truly,
J. F. McNeel
General Chairman

cc: J. M. King, VP-BRT
C. R. Mick, LC No. 141
G. C. Gibson, Sec. No. 141
J. E. Fitz, LC No. 844
H. I. Fearing, Sec. No. 844
PVH:pm

DEFENDANT'S EXHIBIT 4 TO NOELL DEPOSITION.

Letter, March 26, 1966, H. C. Wyatt to F. C. Montgomery.

March 26, 1966.

Mr. F. C. Montgomery, Vice President
Manager, Field Service Department
Brotherhood of Railroad Trainmen
Cleveland, Ohio 44113

Dear Mr. Montgomery:

Referring to your letter February 23, 1966.

During our discussions in Washington, D.C., on April 23, 1962, and as confirmed in the second paragraph, page 3, of my letter to you that date, I stated that my understanding of Section 3 of the "Agreement for Protection of Employees in Event of Approval of Merger and Related Applications Filed by the Norfolk and Western Railway Company and Other Carriers in I.C.C. Finance Docket Nos. 21510, 21511, 21512, 21513, and 21514." dated January 10, 1962, was that the protection afforded employees of the PRR who elected to sever their employee relationship with the PRR and accept employment with

the N&W, would be in direct ratio to their service on the Sandusky Line in the previous 12 months. I further stated that this would apply not only to the employee who actually rendered that service, but also to a junior employee who may be displaced by reason of the senior employee electing to exercise his seniority on other districts of the PRR, but again limited to the service of the senior employee on the Sandusky Line during the prior 12 months.

The protection afforded under the provisions of Section 3 of the agreement was thoroughly explained to the various Organizations' representatives during a series of conferences just prior to the effective date of the merger, and the offer of employment with the N&W was made to the eligible PRR employees under the terms and provisions of Section 3, a copy of which was furnished each eligible PRR employee.

There has been no change in our understanding of the protection afforded by the agreement, and we trust that this explanation will help clarify our position in the matter.

Yours very truly,
H. C. Wyatt
Senior Vice President

B/C
WAN

BRIEF OF AMICUS CURIAE SUBMITTED TO DISTRICT COURT IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

CIVIL ACTION No. 37346.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

IRA CLEMENS,

Plaintiff,

vs.

CENTRAL RAILROAD COMPANY OF NEW JERSEY, LEHIGH AND NEW ENGLAND RAILWAY COMPANY, and LEHIGH AND NEW ENGLAND RAILROAD COMPANY,

Defendants.

BRIEF OF THE INTERSTATE COMMERCE COMMISSION AMICUS CURIAE.

ROBERT W. GINNANE
General Counsel

LEONARD S. GOODMAN
Assistant General Counsel
Interstate Commerce Commission
Washington, D. C. 20423

Attorneys for the Interstate Commerce Commission

February 1966

* * * * *

(Caption repeated.)

STATEMENT.

This suit purports to arise under Section 5(8) of the Interstate Commerce Act, 49 U.S.C. 5(8), and 28 U.S.C. 1336, as an action to enforce the order of the Commission in *Lehigh & New England R. Co. Abandonment*, 312 I.C.C. 645 (1961), to the extent the Commission therein

protected employees from financial injury resulting from the approved transaction. By letter of January 6, 1966, this Court requested the Commission to appear amicus curiae to state its position on the issues in the above-entitled proceeding. While initially calling the Commission's attention to certain areas of dispute, the Court in its further letter of January 17, 1966, to the General Counsel of the Commission added that comments were requested as to any other matters the Commission deemed relevant. The following brief is submitted in accordance with the request of the Court.

PRIOR PROCEEDINGS.

The Commission's order and certificate of September 26, 1961, permitted the Lehigh & New England Railroad Company to abandon all of its owned railroad lines, and the Central Railroad Company (through a subsidiary) to purchase 40 miles of the abandoned lines. Lehigh offered to accept the labor conditions prescribed by the Commission in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271, 281-82 (1952), and the Commission imposed such conditions in the present case (312 I.C.C. at 652).

The New Orleans conditions provide broad protection for affected employees, including protection, among others, against loss of wages, demotions in position, and moving expenses. The conditions also include a provision for compulsory arbitration of disputes.

The gravamen of the present suit, as stated in paragraphs 15 through 20 of the complaint, is that in January of 1962 Lehigh entered into agreements with the three unions representing plaintiff on Lehigh's lines providing that railroad workers (such as plaintiff) who reach the age of 65 are required to retire. Allegedly pursuant to those agreements the railroad has compelled the retirement of a number of employees and refused to continue to pay the protection ordered by the Commission.

Plaintiff alleges in paragraphs 19 and 20 of the complaint that "the New Orleans case * * * precluded the entering into and the carrying out of any forcible retire-

ment program," and that "the forced retirement program was a clear violation of the Act of Congress and the Order and Certificate of the Interstate Commerce Commission * * *."

Thus, like the dispute in this Court in *Roberts v. Lehigh and New England Ry. Co.*, 211 F. Supp. 379 (1962), aff'd 323 F.2d 219 (1963), the present case "arises out of the termination of their [the plaintiffs'] employment and their removal from the seniority rosters of the Lehigh Railway on June 30, 1962, pursuant to collective bargaining agreements between the Railway and the Brotherhoods providing for mandatory retirement at age 65." (211 F. Supp. at 381.) The equally pertinent provisions of the agreements are set forth by the Court of Appeals, as follows (323 F.2d at 221-22):

> The parties have agreed that all employees coming within the scope of the agreement "who have attained the age of 65, or who shall attain that age before July 1, 1962, shall be retired and their names removed from the seniority roster on June 30, 1962.
>
> "Employees who shall attain the age of sixty-five after June 30, 1962, shall be required to retire, and their names will be removed from the seniority roster.
>
> "Neither this agreement, nor any provision contained herein, shall be used as a basis for time or money claims against the Carrier. Disputes involved in the application of this agreement shall be disposed of by the officer of the Railway designated to handle such disputes and the General Chairman.
>
> "This agreement * * * shall cancel and supersede all previous agreements in conflict therewith * * *."

In *Roberts*, rather than enforce the Commission's order, plaintiffs argued that the retirement agreements were invalid and unenforceable, on the grounds, (1) they contravened the Railway Labor Act; (2) they circumvented certain provisions of the Washington Job Protection Agreement of 1936; and (3) they destroyed plaintiffs'

alleged rights to file claims with the local lodges or with the Railway. The appellate court affirmed this Court's dismissal of the suit on grounds it raised no claim upon which relief could be granted.

QUESTION PRESENTED.

We believe that the complaint presents but one issue for decision by the Court. We believe the question presented is simply whether employees may call upon this court to require arbitration of matters pursuant to a Commission order where the duly authorized representatives of the employees, including plaintiff, have agreed to a specific resolution of these matters by subsequent collective bargaining agreement.

STATUTE INVOLVED.

The Commission protects railroad workers who are adversely affected by approved financial transactions (such as mergers, purchases, acquisitions of stock control) pursuant to Section 5(2)(f) of the Interstate Commerce Act. This section provides:

> As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effec-

tive date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Section 5(8) of the Act, 49 U.S.C. 5(8), provides:

The district courts of the United States shall have jurisdiction upon the complaint of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order.

Section 16(12) of the Act, 49 U.S.C. 16(12), provides:

If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to any district court of the United States of competent jurisdiction for the enforcement of such order. If, after hearing, such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

Finally, to complete the relevant statutory provisions, 28 U.S.C. 1336 provides:

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil

action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

POSITION OF THE INTERSTATE COMMERCE COMMISSION ON THE QUESTION PRESENTED.

It is the position of the Commission that the complaint does not allege a claim upon which relief can be granted in this Court, and that the action should be dismissed.

Technically, the cessation of payments to the retired employees has not resulted from the transaction approved by the Commission, but from a subsequent collective bargaining agreement. Section 5(2)(f) provides protection for only injuries that "result" from the transaction. Similarly, the present dispute does not appear to "arise with respect to the protection afforded" by the Commission, within the meaning of Section 8 (the arbitration provision) of the *Oklahoma* conditions,[1] attached as Exhibit I(d) to the complaint; nor does "any dispute or controversy arise * * * in connection with a particular coordination, including an interpretation, application or enforcement of any of the provisions" of the Washington Agreement.[2]

Beyond the technical language of the statute and of the protective conditions, it is clear that the plaintiff's effort to arbitrate his dispute with the railroads by using the Commission's order must necessarily result in circumventing and thereby undermining the binding effect of the retirement agreements between the railroad and plaintiff's duly authorized representatives. We agree with the brief of the defending railroads that plaintiff is here attacking the legality and effectiveness of the compulsory retirement

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[1] So named after the decision in *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177, 197-201 (1944).

[2] For the provisions of this agreement, see *Thompson v. St. Louis-San Francisco Ry. Co.*, 113 F. Supp. 900-903 (S.D. Ala. 1953).

agreements. We believe this must be so, not only from the face of the complaint, as the railroad shows, but also from the obvious fact that it is necessary to plaintiff's position that any arbiter of their claims be empowered to reach a result which may be contrary to the intention of the framers of retirement agreements. Unless the arbiter is only to arbitrate the meaning of the agreements, he will be authorized to circumvent and undermine these bargaining agreements. This result far exceeds the purpose of the Commission's arbitration provision.

Plaintiff does not seek arbitration of the meaning of the agreements. This, we assume in any event, is not a justiciable question; for "if the resolution of the differences between railroad employees, on the one side, and the railroad and the union, on the other, depends on the interpretation of disputed terms of the collective bargaining agreement, then the dispute must be sent to the National Railroad Adjustment Board, which has exclusive primary jurisdiction to make the interpretation." *Roberts* case, *supra,* 323 F.2d at 222.

What plaintiff seeks is an arbitration of a dispute that results from the entry by the unions and the railroad into agreements, and the railroad's actions taken allegedly pursuant to those agreements. Plaintiff improperly seeks an arbitration of the dispute outside and independent of those agreements. It is our position that plaintiff's rights, if any, must depend upon an interpretation of those agreements in a proper forum, rather than an interpretation or enforcement of a Commission order in this Court.

It may be noted at the outset that the question before the Court is not within the primary jurisdiction of the Commission. It concerns an interpretation of the statute and of private agreements. No citation of authority is necessary to establish that this Court is well-equipped to decide whether the retirement agreements take precedence over the protection granted by the Commission under Section 5(2)(f); and if any doubts may linger with respect to the interpretation of contracts, it is well-settled that this,

too, is a judicial and not an administrative function. *Walker v. United States,* 208 F. Supp. 388, 396 (W.D. Tex. 1962), aff'd 372 U.S. 526.

The protective conditions of the Commission's order, including the arbitration provision, were entered pursuant to the first two sentences of Section 5(2)(f). The third sentence expressly authorized the unions and the railroad to enter into "an agreement pertaining to the protection of the interests of said employees," quite apart from any protection ordered by the Commission.

In some cases, Commission decisions will take precedence over private agreements, pursuant to Section 5(11) of the Interstate Commerce Act, 49 U.S.C. 5(11). However, since implementing agreements entered pursuant to the third sentence of Section 5(2)(f) are expressly authorized "Notwithstanding any other provisions of this Act," their legal effect is to displace Commission-ordered protection and to provide that the rights of employees derive from the agreements and no longer from the order.

A controversy similar to the present one was decided by District Judge Miller in *Arnold v. Louisville and Nashville Railroad Company,* 180 F. Supp. 429 (M.D. Tenn. 1960). The Commission had approved a merger of two railroads, and had adopted the same *New Orleans* conditions for the protection of employees. Subsequent to the Commission's decision, the railroad and the duly authorized representatives of its employees entered into an agreement providing an additional separation allowance and a specific mode for arbitrating disputes. Plaintiff employees argued they were not affected by the agreement, and rested their claims solely on the Commission's order. The district court rejected their argument on the ground it "ignores" the third sentence of Section 5(2)(f), and added (at 433-34):

> Thus, while the statute requires the Commission to make provisions for the protection of employees adversely affected, it specifically reserves to the railroad employees the right, through their duly author-

ized representatives, to enter into an agreement with the railroad as to terms, conditions and arrangements for their own protection. Under this provision of the statute, as the Court construes its meaning and effect, the employees may, through a collective bargaining agreement with the railroad, make provisions for their own protection by adopting, supplementing or implementing the provisions made by the Commission for their protection. It would appear logically to follow that such an agreement takes the place of the order of the Commission insofar as the agreement and the order relate to the same subject matter. The Court, therefore, holds that any rights of plaintiffs to receive the lump sum payments they are seeking to recover derive from the Memorandum of Agreement effective January 16, 1958, and that such agreement is the foundation of their rights in this respect.

Since plaintiffs' rights are founded upon a contract, they cannot be maintained, under 28 U.S.C. § 1336, as actions to enforce an order of the Interstate Commerce Commission.

In a subsequent phase of that controversy, the L & N sought a declaratory order regarding the method to be employed in arbitrating the employee claims. *Louisville and Nashville R. Co. v. Cantrell,* 215 F. Supp. 229 (M.D. Tenn. 1962), aff'd *sub nom. Batts* case, *infra.* The district court added the following to its ruling in *Arnold* (at 233):

> The agreement, providing the method of arbitration, clearly pertained "to the protection of the interests" of the employees, and the Court is of the opinion that it was authorized both by the Interstate Commerce Commission's order and by the Interstate Commerce Act, that it is binding upon the railroad and the employees; and that the arbitration procedure to be followed is the procedure prescribed in the agreement itself.

* * * * *

> Further, Section 5(2)(f) of the Interstate Commerce Act, as heretofore pointed out reserves to the railroad and the duly authorized representative or representatives of its employees the right to enter into agreements pertaining to the protection of the interests of the employees.

The Court of Appeals for the Sixth Circuit sustained the *Cantrell* opinion in *Batts v. Louisville and Nashville R. Co.*, 316 F. 2d 22 (1963), holding, "that the agreement between the carrier and the representative of its employees was binding upon the employees *.* *." (at 27.)

The compulsory retirement agreements before this court likewise may change the protection afforded the employees as a result of the approved transaction; in either event the rights to benefits of employees required to retire thereafter flow from such agreements.

It may be expected that it is more typical, where the unions and the railroads are able to agree upon the protection to be accorded employees, that agreement is generally reached during the course of the proceedings before the Commission. Where employee unions and railroads have stipulated to a particular set of labor conditions, the Commission has consistently imposed such conditions for the protection of the union members. *E.g., Gulf, M. & O. R. Co. Purchase, Securities,* 261 I.C.C. 405, 434 (1945); *Erie R. Co. Trackage Rights,* 295 I.C.C. 303 (1956); *Delaware, L. & W. R. Co. Trackage Rights,* 295 I.C.C. 743 (1958). In some cases, the Commission has adopted such stipulated conditions for employees whose unions signed such agreements even when it was of the view that different protection should be adopted for employees not represented in the stipulation. See, *e.g., Wheeling & L. E. Ry. Co. Control,* 267 I.C.C. 163, 184 (1946); *Pere Marquette Ry. Co. Merger,* 267 I.C.C. 207, 235 (1947); *Detroit, T. & I. R. Co., Control,* 275 I.C.C. 455, 487 (1950); *Valdosta S. R. Purchase,* 282 I.C.C. 705, 711-12 (1952).

In more recent cases the Commission has held that, "as to employees covered by the aforementioned agreements, no conditions to our order are necessary"; and prescribed a set of conditions only for those "not protected by the foregoing stipulations and agreements." *Norfolk & W. Ry. Co. Merger,* 307 I.C.C. 401, 439 (1959). Or upon noting that a particular union-carrier stipulation was "of the character contemplated by section 5(2)(f) of the act for the protection of railroad employees who may be adversely affected by the authorized transaction," the Commission has simply held, "as to the employees covered by the stipulation, no conditions in our orders are necessary," and prescribed conditions only to protect "employees of the applicants [railroads] not covered by the aforesaid stipulation." *Chicago & N.W. Ry. Co. Purchase,* 312 I.C.C. 285, 296 (1960); and see *Duluth, S. S. & A. R. Co. Merger,* 312 I.C.C. 341, 356 (1960). Thus, even when protective conditions are stipulated during the course of the proceeding, the employees covered by such agreement must claim their benefits under and pursuant to such agreement, and not under or pursuant to the Commission order.

CONCLUSION.

It is our view that plaintiff's rights, to the extent the payment of protective benefits have been disrupted, if at all, by subsequent collective bargaining agreements, now flow from such agreements, rather than the Commission's order. Whether the retired employees should continue to receive benefits is a matter of the intention of the parties to the agreements. As the Court of Appeals noted in the *Roberts* case, this question is still open, and the affected employees may have a cause of action before the National Railroad Adjustment Board or for breach of contract; neither would flow from the Commission order. But as in the *Arnold* and *Cantrell* cases, the present Plaintiff may not use the Commission's order, or the processes of this Court pursuant to such order or to the statute, to

undermine the binding effect of implementing agreements made pursuant to the third sentence of Section 5(2) (f) of the Interstate Commerce Act.

Respectfully submitted,

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(Certificate of Service Omitted.)

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No. 20,326.

United States Court of Appeals

FOR THE SIXTH CIRCUIT.

RICHARD NEMITZ, *et al.*,

Plaintiffs-Appellees,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

DOCKET ENTRIES.

1970

Mar. 30. *Certified record* (7 vols. pleadings and exhibits), filed; and cause docketed

Apr. 3. Appearance of counsel for Appellant

Apr. 7. Motion of Appellant for permission to file brief in excess of page limitation, between 65 and 70 pages in length, with proof of service (Granted—JWP)

Apr. 16. Appearance of counsel for Appellant

May 7. Ten copies of Appendix

May 7. Proof of service of appendix

May 11. Twenty-five copies of Brief for Appellant

May 11. Proof of service of Brief for Appellant

June 10. Twenty-five copies of Brief for Appellees

June 10. Proof of service of brief for Appellees

June 29. Twenty-five copies of Reply Brief for Appellant

June 29. Proof of service of reply brief for Appellant

Sep. 28. Cause argued and submitted (Before: Celebrezze, Miller and Weinman, JJ.)

1971

Jan. 15. Judgment of the District Court modified and case remanded for further proceedings

Jan. 15. Opinion by Miller, J.

Jan. 25. Appellant's bill of costs, with proof of service

Jan. 27. Appellee's bill of costs, with proof of service

Feb. 1. Letter from counsel for Appellant requesting preparation of record for Supreme Court of the United States

Feb. 3. Motion of Appellant for stay of the mandate

Feb. 4. Certified record for certiorari application, including original record on appeal, mailed to Clerk of United States Supreme Court

Feb. 15. Order staying mandate thirty days (Miller, J.)

Feb. 17. Notice of filing petition for writ of certiorari 3/15/71 (Supreme Court No. 1470)

June 3. Certified copy of order of Supreme Court granting certiorari

No. 20,326.

UNITED STATES COURT OF APPEALS.

FOR THE SIXTH CIRCUIT.

RICHARD NEMITZ, *et al.*,

Plaintiffs-Appellees,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

OPINION OF COURT OF APPEALS.

(Decided and Filed January 15, 1971.)

Before: CELEBREZZE and MILLER, Circuit Judges, and WEINMAN, District Judge.*

MILLER, *Circuit Judge.* This action arose out of the merger of the Norfolk and Western Railway Company with the New York, Chicago & St. Louis Railroad Company (Nickel Plate), the lease by the Norfolk and Western of the Wabash Railroad Company, and the purchase by the Norfolk and Western of the Sandusky Line from the Pennsylvania Railroad. These transactions were authorized in 1964 by the Interstate Commerce Commission pursuant to the Interstate Commerce Act, 49 U.S.C. Sec. 5(2), 324 I.C.C. 1 (1964).

The appellees are employees of the Sandusky Line which was a part of the Toledo Division of the Pennsylvania Railroad. Sandusky was a seasonal line, operating only when Lake Erie was not frozen. Hence, the em-

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* Honorable Carl A. Weinman, Chief Judge, United States District Court for the Southern District of Ohio, sitting by designation.

ployees of Sandusky prior to the merger could work on that line part of each year. During the remainder of the year these employees worked on other parts of the Toledo Division of the Pennsylvania Railroad.

The appellees took the option given them to remain with Sandusky after its purchase by the Norfolk and Western, primarily because their respective residences were in Sandusky, Ohio.

In 1962, prior to the I.C.C. authorization of the merger, the union to which the appellees belonged, the Brotherhood of Railroad Trainmen, and several other unions, entered into an agreement with the Norfolk and Western. This agreement provided, *inter alia,* that the employees affected by the merger would not be placed in a worse position financially because of the proposed merger. The 1964 I.C.C. order authorizing the merger, lease, and purchase dealt with the protective benefits to be afforded the affected employees. Subsequently, a dispute arose as to payment of the protective benefits. In order to reach a compromise before arbitration was to have been initiated, the Norfolk and Western and the Brotherhood of Railroad Trainmen entered into Implementing Agreement 1-A (1967). Compensation for the appellees, according to this Agreement, would be based on the amount of time worked on the Sandusky Line alone—not, as the 1962 agreement provided, the time worked on the entire Toledo Division. The "test period" as in the 1962 agreement, was the twelve (12) months prior to the effective date of the merger. The appellees petitioned their union to initiate arbitration in order that they might receive those benefits to which they maintained they were entitled under the 1962 agreement.[1] The Brotherhood of Railroad Trainmen refused to arbitrate. Appellees then instituted this action in the court below.

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[1] The 1962 agreement contained an arbitration clause providing generally that any dispute or controversy arising between the Norfolk & Western and the union "with respect to the interpretation or application of any provision of this agreement . . . may be referred by either party to an arbitration committee for consideration and determination."

The complaint alleged that the provisions of the 1962 agreement were incorporated into the I.C.C. order of 1964; that the appellees were thus guaranteed by that order that they would not be placed in a worse position as to compensation as a result of the merger; that they were so placed by virtue of the merger; and that the Norfolk and Western had violated the provisions of the I.C.C. order. The appellees invoked the jurisdiction of the District Court to recover damages under 49 U.S.C. Sec. 9,[2] an injunction under Sec. 16(12), and attorneys' fees and cost under Sec. 8. The damages sought were based on the difference between compensation for time on the Sandusky Line alone during the test period and time worked on the entire Toledo Division,[3] including the time on the Sandusky Line, during the test period.

The appellant filed a Motion to Dismiss on three (3) grounds: (1) lack of subject matter jurisdiction; (2) accord and satisfaction of the claims of the appellees;[4] and (3) the failure of the appellees to exhaust their administrative remedies. The appellees filed a Motion for Sum-

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[2] Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt.

[3] We construe the 1962 agreement as incorporated in the I.C.C. order as meaning that the appellees were to suffer no loss of compensation based upon their inability to work throughout the entire Toledo Division—not limited to their earnings on the Sandusky line alone. We reject the contention of appellant that the 1962 agreement intended to impose this limitation on compensation as distinguished from the "duration of employment" limitation of Sec. 3. However, we also construe the agreement as meaning that the employees shall not be protected to the extent that any loss of earnings is due to "a furlough because of reduction or decline in volume of traffic or revenues."

[4] The defense of accord and satisfaction, however, is not urged on appeal and will not be discussed herein.